Volume XII Number 2

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DECEMBER, 1939

LEADING ARTICLES

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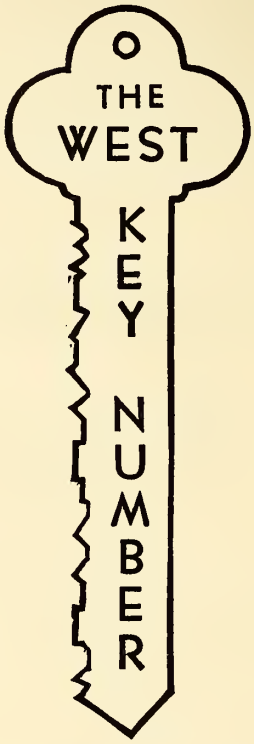

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STATEMENT OF THE OWNERSHIP, MANAGEMENT, CIRCULATION, ETC., REQUIRED BY THE ACTS OF CONGRESS OF AUGUST 24, 1912, AND MARCH 3, 1933.

Of Mississippi Law Journal, published 5 times annually at University, Mississippi, for October, 1939.

State of Mississippi }
County of Lafayette } ss.

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Sworn to and subscribed before me this 28th day of September, 1939.

(Signed) Ruby McCoy, Notary Public.
(My commission expires Sept. 24, 1940).

Mississippi Law Journal

JOURNAL of the MISSISSIPPI STATE BAR

VOL. XII DECEMBER, 1939 No. 2

THE SEPARABLE CONTROVERSY— A FEDERAL REMOVAL CONCEPT

*Edwin R. Holmes**

There is no appeal from an order of the United States District Court remanding a case to the state court from which it was removed. For this reason, the number of cases involving separable controversies which reach the Supreme Court of the United States is very limited. This gives increased interest and importance to its latest decision on the subject. It was an action for damages, begun in a state court of California, for the wrongful death of R. W. Jenkins, a railroad conductor, who died from a blow struck by A. J. Kash, a drunken and disorderly passenger who was being ejected from a train of the Southern Pacific Company by Jenkins, assisted by the Pullman conductor and police officers.

The plaintiffs, citizens of California, were the widow of the deceased, and his minor son, the latter being represented by his mother as guardian *ad litem*. The defendants were the Southern Pacific Company, a Kentucky corporation, the Pullman Company, an Illinois corporation, and four individuals, all citizens of California, as follows: Hatch, Pullman conductor, Myers, Pullman porter, Dolsen, gate tender for the Southern Pacific, and Kash, the disorderly passenger who struck the fatal blow.

There was no charge of fraudulent joinder, and the Pullman Company alone filed a petition to remove on the sole ground of a separable controversy between it and the plaintiffs. The federal district court overruled a motion to remand.[1] The Circuit Court of Appeals reversed with directions to remand.[2] The Supreme Court affirmed the Circuit Court of Appeals, but stated that the

*Judge of the United States Circuit Court of Appeals for the Fifth Circuit.
[1]Jenkins v. Southern Pacific Co., 17 F. Supp. 820 (S. D. Cal. 1937).
[2]Jenkins v. Pullman Co., 96 F. (2d) 405 (C. C. A. 9th, 1938).

latter had put its decision upon the wrong ground.[3] Mr. Justice Black concurred in the result, but dissented from certain language in the opinion which he deemed unnecessary to the decision.

After the petition for removal was filed in the state court there were two amendments to the original complaint, and Mrs. Jenkins, as administratrix of the estate of the decedent, by agreement was substituted as plaintiff; but the Supreme Court disregarded both amendments, as well as the substitution, and decided the jurisdictional issue upon the allegations of the complaint at the time the petition for removal was filed. The liability of the Southern Pacific and the Pullman Companies rested solely upon the doctrine of *respondeat superior*, and depended upon the alleged negligence of the gate keeper and porter, respectively, in permitting Kash to pass through the gates and enter the Pullman coach while drunk, disorderly, and without a ticket. As both of these employees, as well as Kash and the Pullman conductor, were citizens of California, there was no separable controversy as to either company which warranted removal to the federal court.

The opinion of the Chief Justice restates a number of legal principles applicable to cases of removal, some of which are so well settled as not to call for any special mention at this time. The only really novel question of general importance presented to the court for decision was the effect of the joinder of the Pullman porter, who was sued by a fictitious name, whose residence was not set forth in the complaint, and who was not served with process prior to the petition for removal.

After stating in its opinion that, if the porter had been sued in his proper name instead of as John Doe, had been alleged to be a citizen of California, and had been served with process prior to the petition for removal, there could be no question that the Pullman Company would not have been entitled to remove, the court held that the absence of these facts did not justify removal, since the porter's relation to the Company and his negligence were fully alleged, and since it was incumbent upon the Pullman Company to show that he was a non-resident. This was because there was a non-separable controversy stated in the count against the Pullman Company, and bad faith in not having process served on its porter was not alleged, so as to open the way for removal on the ground of fraudulent joinder.

---

[3]Pullman Co. v. Jenkins, 305 U. S. 534 (1938).

In his specially concurring opinion, Mr. Justice Black insisted that the action in the state court was originally brought under the Federal Employers' Liability Act and was not removable for that reason. His conclusion rested upon a doubtful construction of the complaint when the petition for removal was filed, and since its correctness depended upon the particular pleading, and the court held otherwise, we need not discuss this feature of the case, as the exact question is not likely to recur. He also objected to the statement in the opinion that, if, as to the non-resident seeking removal, the controversy is separable within the purview of the statute as construed, the fact that under the state practice it may be joined in the same suit with another controversy as against other defendants does not preclude removal. This question is frequently raised, and merits further consideration.

The statement of the Chief Justice means only that we look to the federal decisions for the construction of the federal statutes. It does not mean that we should disregard state statutes or decisions which form the basis of the cause of action. The tort was committed in California, and the complaint, as construed by the court, based liability solely upon the law of that state. In these circumstances, we look to the state law to determine what the cause of action is, and the elements which compose it, while we look to the federal statutes, as construed by federal decisions, to determine whether such cause of action, so composed under state law, contains a separable controversy which is wholly between citizens of different states, and which can be fully determined as between them.[4]

Joint liability of defendants for torts is generally a matter of state law, but, in suits with respect thereto, the removability of controversies between citizens of different states is a matter of federal law. The concept in relation to removability is of federal statutory origin. Whether the alleged separable controversy has the required statutory elements to warrant removal is determined by the federal statutes, as construed by federal decisions; what its elements are is determined by state law. Where independent causes of action which are not really an integral part of one suit are, as a matter of expediency, under state statutes joined in one case, there is no separable controversy under the federal act which warrants its entire removal to the federal court.[5] State practice is not determinative of removability.

[4] 28 U. S. C. A. § 71.
[5] Hammer v. British Type Investors, 15 F. Supp. 497 (S. D. N. Y. 1933).

The separable controversy relied on for removal must be one upon which a separate suit might have been brought in the federal court.[6] This is a matter of federal jurisdiction as prescribed by federal statutes. The separable controversy must be wholly between citizens of different states, must involve over three thousand dollars, exclusive of interest and costs, and must be one which can be fully determined as between the parties to it without the necessity of other parties.[7] It must be more than a mere collateral or incidental dispute, even though incidental relief is sought which relates to only one defendant.[8] Whether a resident defendant may remove on the ground of separable controversy is a federal question which has never been decided by the Supreme Court, but the weight of authority is that only a non-resident defendant may do so.[9]

In cases of removal upon the ground of a separable controversy, it is essential to distinguish between a cause of action and the facts or particular acts of negligence which show that a right has been violated. A cause of action is not created by negligence from which no harm ensues. In the instant case, no cause of action arose to the deceased until his right of bodily safety was violated. None accrued to the plaintiffs until he died. A plurality of negligent acts does not establish more than one cause of action so long as their effect is the violation of only one right by a single legal wrong. The mere multiplication of grounds of negligence does not result in multiple causes of action unless, under the facts, there has been a violation of multiple legal rights. The cause of action, then, is not the negligent act, or any group of facts, "but the result of these in a legal wrong, the existence of which, if true, they conclusively evince."[10]

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[6]Fraser v. Jennison, 106 U. S. 191 (1882); Boehne v. Southwestern Bell Tel. Co., 10 F. Supp. 788 (W. D. Tex. 1939); Harrison v. Harrison, 5 F. (2d) 1001 (N. D. Miss. 1922).

[7]Hyde v. Ruble, 104 U. S. 407 (1881); Geer v. Mathison Alkali Works, 190 U. S. 428 (1902).

[8]Fidelity Ins. Co. v. Huntington, 117 U. S. 820 (1885); Campbell v. Milliken, 119 Fed. 981 (C. C. D. Col. 1902).

[9]Rand v. Hercules Powder Co., 28 F. (2d) 131 (S. D. N. Y. 1928); Visayan Refining Co. v. Standard Transp. Co., 17 F. (2d) 642 (S. D. N. Y. 1927); Whitaker v. Condon, 217 Fed. 139 (D. C. D. 1914); Drovers' Deposit Nat. Bank v. Tichenor, 202 Fed. 1013 (E. D. Wis. 1913); Wichita Nat. Bank v. Smith, 72 Fed. 568 (C. C. A. 8th, 1896); Thurber v. Miller, 67 Fed. 371 (C. C. A. 8th, 1895). See, also, Andrews, *Federal Removal Confusion* (1937) 9 MISS. L. J. 188.

[10]Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 321 (1927).

In the opinion under review, it is stated that the plaintiffs alleged two causes of action, one against all of the defendants, the other against Kash alone. The use of the term *cause of action* in this connection is misleading. The court only meant to say that there were two counts in the complaint. Its intention was to refer to counts and not to causes of action. This is made certain by the further statement that there was clearly a separable controversy as to Kash. The latter was the sole defendant under the second count, and it is impossible to attribute to the court the intention to say that this count set forth a separable controversy under the federal statute which would have warranted removal of the entire suit if Kash had sought it upon the ground of diversity of citizenship. In the first place, Kash was a citizen of the same state as the plaintiffs; he had not sought removal; and no such question was before the court. In the second place, the court had just stated that, in the first count, there was one cause of action against all of the defendants, including Kash, and the principal point of its decision on the only jurisdictional issue before it was that this was a non-separable controversy with respect to the Pullman Company, the only defendant which sought removal.

It has been said that the phrase *cause of action* has shifting meanings; that its use should be avoided where possible, as has been done in the new federal rules; and that we should reach for some more limited concept to explain the decisions in cases involving removal upon the ground of a separable controversy. In *U. S. v. Memphis Cotton Oil Co.*,[11] Justice Cardozo said:

> "A 'cause of action' may mean one thing for one purpose and something different for another.[12] It may mean one thing when the question is whether it is good upon demurrer, and something different when there is a question of the amendment of a pleading or of the applition of the principle of res judicata. Cf. Chicago R. I. & P. Ry. Co. v. Schendel, 270 U. S. 611, 617; Baltimore S. S. Co. v. Phillips, 274 U. S. 316, 321. At times and in certain contexts, it is identified with the infringement of a right or a violation of a duty.[13] At other times and in other con-

[11]288 U. S. 62, 67 (1933).

[12]"The uncertainties of the phrase have been well developed by Dean Clark with full citation of the decisions in his treatise on Code Pleading, pp. 75-87, 501-508." [Judge's note.]

[13]"Clark, Code Pleading, p. 81 and cases there cited. Pomeroy, Code Remedies, 4th ed., Sec. 347." [Judge's note.]

texts, it is a concept of the law of remedies, the identity of the cause being then dependent on that of the form of action or the writ.[14] Another aspect reveals it as something separate from writs and remedies, the group of operative facts out of which a grievance has developed.[15] This court has not committed itself to the view that the phrase is susceptible of any single definition that will be independent of the context or of the relation to be governed."[16]

The result in *Pullman Co. v. Jenkins* was the same as in all similar instances in the Supreme Court where the action was for damages for wrongful death or personal injuries: the case was remanded;[17] and, as we have seen, the most important part of this decision is the holding that the first count of the declaration stated a joint cause of action against all of the defendants, including Kash and the Pullman Company. If there were any inconsistency between this ruling and the statement that the second count set forth a separable controversy as to Kash, the former should prevail because it was decisive of the jurisdictional issue on the motion to remand, and the Pullman Company, who alone sought removal, was not named as a defendant in the second count.

There was one wrong which gave rise to a joint and several cause of action. In the first count, all tort-feasors were sued jointly; in the second count, one of them was also sued separately. Plaintiffs might have brought separate suits and prosecuted them until full satisfaction was obtained; but, whatever remedies were pursued, the cause of action was the same, namely, the wrongful death of plaintiffs' intestate. The question was not whether separate suits might have been brought, but whether a joint one would lie, and, if so, whether it contained a separable controversy having the statutory requisites to warrant removal. The statement that there were two causes of action was first made by the trial court, doubtless because of the form of the pleadings. It was repeated by the Circuit Court of Appeals, and, nobody appearing to controvert it, the Supreme Court said it again, but failed to discuss or disclose the constituent elements of the two causes.

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[14]"Clark, *supra*, p. 502, and cases there cited." [Judge's note.]

[15]"Clark, *supra*, pp. 83, 84, 505, and cases there cited." [Judge's note.]

[16]See, also, Hurn v. Oursler, 289 U. S. 238, 247 (1933), and concurring opinion of Judge Clark in Collins v. Metro-Goldwyn Pictures Corp., 106 F. (2d) 83 (C. C. A. 2d, 1939).

[17]See authorities cited in Tolbert v. Jackson, 99 F. (2d) 513, 515-516 (C. C. A. 5th, 1938).

The gravamen of the plaintiffs' case consisted in the violent blow which caused the death of the deceased. The issues were whether there was injury for which the defendants were responsible, and, if so, what was the measure of damages. Whether the assault was intentional and malicious, or merely negligent, and whether the damages recoverable were both actual and punitive, or merely actual, were simply component parts of one controversy, and did not constitute separate and distinct causes of action. The count against Kash in company with his co-defendants was fundamentally the same as the separate count solely against him. Both were for compensatory damages only, and might have been grouped or consolidated upon order of the court; but, if punitive damages had been asked as to Kash, the claim therefor would not have constituted a separable controversy, because the general rule is that such damages are not recoverable apart from actual damages. This is the rule in California, where the tort was committed.[18]

At the time the fatal blow was struck, the two companies (each by its conductor) were acting together in ejecting a disorderly passenger from the train. The plaintiffs' theory of liability of the Pullman Company was that the negligence of its porter in permitting him to board the train was a proximate cause which materially contributed to the injury. If it was such cause, it necessarily concurred with the wrongful act of Kash in striking the blow. The liability of the Southern Pacific Company was predicated solely upon the negligence of its gate tender in permitting Kash, while drunk and disorderly, to go through the gates to board the train without a ticket. His negligent act created a dangerous condition upon the premises of the railroad company. This condition was transferred to the train by the act of the porter in permitting Kash to enter the Pullman car. In consequence of both acts, the dangerous agency or condition continued to be an active force until it culminated in foreseeable harm. Although there was no concert of action between the tort-feasors, the cumulative effect of their several acts was a single, indivisible injury which probably would not have resulted but for the concurrence of such acts. In these circumstances, the actors may be held liable as joint tort-feasors.[19]

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[18]Lamb v. Harbaugh, 105 Cal. 680, 39 Pac. 56 (1895); Clark v. McClurg, 215 Cal. 279, 4 P. (2d) 149 (1931), 9 P. (2d) 505 (1932); Mother Cobb's Chicken Turnovers v. Fox, 73 P. (2d) 1185 (Cal. 1937); See, also, Boehne v. Southwestern Bell Tel. Co., 10 F. Supp. 788 (W. D. Tex. 1935).

[19]COOLEY, TORTS (4th ed. 1932) p. 279.

Questions of remote and proximate cause, and of the authority of the porter or gate tender, may arise upon the trial, but these issues go to the merits of the case and do not affect the right of removal, there being no charge of fraudulent joinder. If separate suits are filed in the same court, they may be consolidated in proper cases; if they are filed in different courts, pleas in abatement or other defenses may be employed by the defendants, but with what success we need not inquire. These are questions of state practice with which we are not concerned in matters of removal to the federal court. In such cases, each suit is considered separately, and if within that suit there is a separable controversy of the requisite amount, wholly between citizens of different states, and which can be fully determined as between them, the case is removable; otherwise not. If separate and unrelated controversies are joined in the same complaint or declaration, whether in one or more counts, the entire suit should not be removed, but only the cause of action over which jurisdiction exists by reason of diversity of citizenship. In order to eliminate many trials, the state practice may permit numerous unrelated causes of action between the same parties to be tried together, but, if there is diversity of citizenship, the right of removal under the federal statute in a proper case is not impaired or affected thereby.[20]

In observing the distinction between a suit which is removable in its entirety on the ground of a separable controversy wholly between citizens of different states, and which can be fully determined as between them, and one where separate and unrelated causes of action are joined in the same complaint, it is interesting to note the play of similar principles when jurisdiction depends upon a substantial federal question, as an integral part of the plaintiff's case, though there be other non-federal questions involved. In such case, under both original and removal jurisdiction, the federal court will decide all issues necessary for decision, whether they be local or federal, and even though the federal question is not decided at all; but the rule does not go so far as to permit a federal court to assume jurisdiction of a separate and distinct cause of action because it is joined in the same complaint with one involving a federal question.[21]

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[20]Tillman v. Russo Asiatic Bank, 51 F. (2d) 1023 (C. C. A. 2d, 1931); Young v. So. Pac. Co., 15 F. (2d) 280 (C. C. A. 2d, 1926); Rogge v. Michael Del Balso, Inc., 15 F. Supp. 499 (C. C. A. 8th, 1926).

[21]Siler v. L. & N. R. Co., 213 U. S. 175 (1908); Kasch v. Cliett, 297 Fed. 169, 171 (C. C. A. 5th, 1924).

The line of demarcation is between a suit where two distinct grounds, one only of which presents a federal question, are alleged in support of a single cause of action, and a case where two separate and unrelated causes of action, one only of which is federal in character, are set forth in the same complaint. In the former, the federal court may dispose of the case on the non-federal ground; in the latter, it must dismiss or remand the non-federal cause of action.[22]

The concept of separable controversy involving a federal question may be present in a suit in the state court, but it plays no part in determining removability of the entire suit, since the federal question must be an integral part of the whole case, and all of the defendants must join in the petition for removal. Only in matters of diversity of citizenship may a number less than all of the defendants remove the entire suit on the ground of a separable controversy, this being a specialized form of removal, as Dobie says, which is of practical importance only when some of the defendants seek removal, but the others are unwilling to join in the petition therefor, or when some but not all of the defendants are citizens of the same state as the plaintiff or citizens of the state in which the suit is brought.[23]

There have been conflicts when different courts have undertaken to apply the federal removal statute, because it has been necessary for them, in applying it, to demarcate the line between state and federal tribunals having concurrent jurisdiction of cases as to which the choice of forum ordinarily rested with the plaintiffs. As time passes that line is becoming clearer, but whether a particular case falls on one side or the other, or partly on one side and partly on the other, remains an inherently difficult question involving careful scrutiny of facts and nice distinctions of law. In order to adjudge judicial power and make the delicate adjustment between courts on the ground of a separable controversy, the particular suit must be analyzed to ascertain the elements which compose it, the relation to each other of its constituent parts, and the law conferring the right upon the violation of which the action depends. These intricate problems of apportioning jurisdiction between the state and federal courts are of paramount importance. They arise out of our dual form of state and national governments, each with its separate tribunals exercising the judicial powers

[22]Hurn v. Oursler, 289 U. S. 238 (1933).
[23]Dobie, Federal Jurisdiction and Procedure (1928) § 95, p. 371.

of a distinct sovereignty over the same people and property, at the same time, and within the same territorial limits. The third-party practice recently introduced by the federal rules of civil procedure furnishes a new field for similar jurisdictional problems.

These problems must be met and solved by the courts. To use the classic language of Blackstone: "If our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimparied by disease or intemperance, the task would be pleasant and easy."[24] We should need no other guide but reason.

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[24] 1 Bl. Comm. * 41.

A CRITIQUE OF THE CONCEPT "VESTED" UNDER THE RULE AGAINST PERPETUITIES†

*Loring P. Jordan, Jr.**

> "I will tell you where I will stop: I will stop wherever any visible inconvenience doth appear; for the just bounds of a fee-simple upon a fee-simple are not yet determined, but the first inconvenience that ariseth upon it will regulate it."

So spoke Lord Nottingham in the *Duke of Norfolk's Case*[1] two hundred and fifty years ago when he decided that no public policy forbade limiting a term on a term within the space of a life in being. In the period since Lord Nottingham's decision common law courts have examined many limitations in a search for such "visible inconveniences" as the learned Lord Chancellor had in mind. Some dispositive provisions have been held to violate sound public policy and others have been upheld in the belief that they were not dangerous. What is today known as the Rule against Perpetuities is but a synthesis of such decisions. However, with the emergence of the Rule there has been a change of emphasis. Courts no longer find it necessary to feel their way along as did Lord Nottingham: limitations are not tested to see whether they violate broad considerations of public policy. Particularized considerations have given way to the single question of whether the Rule against Perpetuities is violated. John Chipman Gray spoke strongly as a champion of this codification:

> "If the answer to a problem does not square with the multiplication table one may call it wrong, although it be the work of Sir Isaac Newton; and so if a decision conflicts with the Rule against Perpetuities, one may call it wrong, however learned and able the court that has pronounced it. That I have done all my own sums correctly, I do not venture to hope . . . ."[2]

---

†Only the common law rule is here considered, for an appraisal of the modern English rule see Farrer, *The Modern Law Against Perpetuities* (1937) 1 CONVEY. (N. S.) 193.

*A.B. 1935, Dartmouth College; LL.B. 1938, Harvard; LL.M. 1939, Harvard.

[1]3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

[2]GRAY, THE RULE AGAINST PERPETUITIES (1st ed. 1886) Preface V.

There is manifest in this as in many others of Gray's writings a conviction that the Rule against Perpetuities is a timeless thing, subject to change only by statute.[3]

Doubtless such a transition is not uncommon. When faced with an original question courts are likely to consider the public policy involved. A few decisions will be moulded into a rule of law. Later cases are decided on the basis of the rule of law and no further mention is made of public policy. This may be all very well, if the basic cases are well decided, if the generalization derived from them truly reflects their decision, if the general rule is properly understood and applied, and if the reasons behind the original decisions retain their force. But the process ought always to be open to examination as to whether the transition has produced a satisfactory rule. Are the results obtained under the Rule against Perpetuities consistent with some compelling rationalization—either Lord Nottingham's or a modern equivalent?[4] Such speculations form the content of the following pages. It is the purpose of this paper to examine certain results obtained under the modern Rule and determine whether they are capable of consistent rationalization. Do interests valid under the Rule have some common element distinguishing them from invalid interest and justifying their absolution?

Nature of the Modern Rule

By all odds the best known expression of the Rule is to be found in Gray's third edition:

> "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest."[5]

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[3]This limitation of the law as to perpetuities to rules, or even more, to a single rule, is a striking example of the shortcomings of nineteenth century legal thinking as pointed out by Dean Pound. [Citing: *The Ideal Element in Law*, an address delivered June 10, 1932; 38 Proc. Iowa State Bar Ass'n. 223, 232; Interpretations of Legal History (1923) 155.] As used for two centuries the term epitomized whatever tended to the indefinite suspension of the alienability of land. As such it was a vital force for freedom of alienation. Bordwell, *Alienability and Perpetuities* (1937) 22 Iowa L. Rev. 437, 439. For a recent expression of the belief that the courts are adequate to eliminate what are considered anomalies in the Rule see the letter of T. Cyprian Williams, 7 Stone-Buildings, Lincoln's Inn, to the London Times of April 23, 1928.

[4]See Note (1938) 45 W. Va. L. Q. 55, 65.

[5]Gray, The Rule Against Perpetuities (1915) § 201.

What is a vested interest within the meaning of this rule? Gray, in common with most of the other commentators on the Rule, spent little effort upon a consideration of what interests are good under the Rule, despite the fact that he found it necessary to state the Rule in terms of an exception to good interest rather than in terms of those which are invalidated.

It is but repetitious of modern learning to state that the Rule is not directly concerned with a suspension of the absolute power of alienation. However, "the language of the cases has pretty consistently been that the Rule is against the suspension of the power of alienation."[6] As recently as 1868 it was held in England that there could be no violation of the Rule when the whole interest in the property was capable of present alienation.[7] It was not until 1890 that it was finally decided that the rule was to take the form of a prohibition on the remoteness of vesting.[8] Professor Simes is careful to note that it is improper to say that "the rule is not concerned with alienability but only with remoteness of vesting." He points out that the Rule as it emerged aims at the practical possibility of alienation as well as the legal possibility.[9]

Again, "the mere lack of power of alienation, in the sense of the right to make title, is one of the minor characteristics of the rule, whilst its chief characteristic consists in the lack of the power of alienation, in the sense of the right of complete disposal, whether the gift consists of money, stock, bond or land."[10] Here again is an observation that the aim of the modern courts is to make property alienable as a practical as well as a legal matter. The truth of this suggestion may be illustrated in several ways. Perhaps the most striking is the fact that in New York which has a statutory rule against the suspension of the absolute power of alienation, the courts have felt that the common law scheme has so much to commend it that they retain it as a supplement to the statutory system.[11] In other words, it was not enough for New York that persons should exist who could give a good title in fee to property; remote though alienable interests might still deter the free flowage of property.

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[6]Fraser, *The Rationale of the Rule Against Perpetuities* (1921) 6 MINN. L. REV. 560, 561.

[7]Avern v. Lloyd, L. R. 5 Eq. 383 (1868).

[8]In Re Hargreaves, 43 Ch. D. 401 (1890).

[9]SIMES, LAW OF FUTURE INTERESTS (1936) § 514.

[10]Lisle, *Remoteness of Charitable Gifts Once More* (1894) 8 HARV. L. REV. 211, 215.

[11]Matter of Wilcox, 194 N. Y. 288, 87 N. E. 497 (1909); Walker v. Mar-

It is certainly worthy of note that remote future interests in a changeable fund, as in cases where a trustee is given power to change the assets comprising a trust *res*, are not saved by the fact that the particular property is at all times freely alienable.[12] Likewise interests in land are not saved from the operation of the Rule by a statute which permits partition of land at the behest of the holder of a single interest but which provides that the proceeds are to be held for the original owners.[13] Where, however, remote interests are subject to destruction by alienation by a single person or group of co-tenants as when they are interests in default of an *inter vivos* power of appointment or follow a fee tail, they are not invalidated by the Rule.[14] In these three cases the Rule seems to be acting inconsistently. No rationalization seems possible which will account for them all. The primary concern of this paper, however, is not with interests valid because completely alienable, but with those valid because vested. The anomalies of the Rule seem most pronounced when the attempt is made to discover the innocuous characteristics of those interests it classes as vested.

To discuss a rule before knowing the reason upon which it is predicated would seemingly be a fruitless undertaking. Indeed a rule of law not considered in the light of its purpose is likely to lead to decisions diametrically opposed to ends it seeks to accomplish. Without a knowledge of the reason for a rule it would be impossible to say whether a particular decision opposed its principle or whether in contemplation of the decision, the rule had previously been incorrectly stated.

The authorities are virtually unanimous as to the policy which has led to what is now the Rule against Perpetuities. The following may well speak for all:

> ". . . . the rule was to subserve the public policy of fixing a limit beyond which one's disposal of one's property shall cease; in other words, public policy intends that after a certain time one's property shall not be tied

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cellus & Otisco Lake Ry. Co., 226 N. Y. 347, 123 N. E. 736 (1919) commented on by Rundell, *The Suspension of the Absolute Power of Alienation* (1921) 19 MICH. L. REV. 235, 260 *et seq.*

[12]GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) § 202a. Distinguish the question of whether the power of sale itself violates the Rule; Leach, *Power of Sale in Trustees and the Rule against Perpetuities* (1934) 47 HARV. L. REV. 948.

[13]See Mass. Gen. Laws (Ter. Ed. 1932) c. 183, §§ 49-52. See also SIMES, LAW OF FUTURE INTERESTS (1936) § 519.

[14]SIMES, LAW OF FUTURE INTERESTS (1936) §§ 515-519.

> up, that it must pass free and untrammelled to some one who can employ it any way this some one may choose; if property can be tied up beyond the limits fixed by the rule, it would be a colossal check upon progress and enterprise. In short there must be a fee interest in some one within a certain time."[15]

Professor Powell is authority for the statement that the benefits are not alone future in their scope:

> "It is true that the animating purpose of the Rule against Perpetuities is to prevent undesirable imposition of the will of one generation upon the future. This is not entirely altruistic concern for our descendants but is largely based upon a belief that such imposition has present deleterious consequences."[16]

Assume that the animating purpose of the Rule is to promote alienability both for the good of present and future generations. It has often been said that to know the reason for a rule is to know its limits. More than once it has been urged that the operation of the Rule against Perpetuities can be thus confined. "No man can say that it [a limitation] doth break any rule of law unless there be a tendency to a perpetuity, or a palpable inconvenience."[17] Again,

> ". . . . The Rule against Perpetuities took the form of a rule against remoteness in vesting, but the object was to prevent an unreasonable postponement of the power of alienation by a present tenant entitled to the fee. And where that object is not served the rule should not apply."[18]

This paragraph is very much in the nature of a syllogism. It is assumed (and most will concede) that the purpose of the modern Rule against Perpetuities is to aid alienability. It is suggested that the reason for a rule should limit its operation. Let us not hasten to the conclusion that all interests falling under the ban of the Rule are impediments to alienability and that all the interests which are vested (or valid) do not have such an effect. Here the syllogism fails. It is the thesis of this paper that the modern

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[15]Lisle, *Remoteness of Charitable Gifts Once More* (1894) 8 HARV. L. REV. 211, 213.

[16]Powell, *Determinable Fees* (1923) 23 COL. L. REV. 207, 232.

[17]Lord Nottingham in Duke of Norfork's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682).

[18]Fraser, *The Rationale of the Rule Against Perpetuities* (1921) 6 MINN. L. REV. 560, 570.

Rule falls short of such a worthy objective. Any validity this thesis may have must be founded upon an analysis of what "vestedness" means in connection with the Rule.

Vested Interests in Land

For a meaningful discussion of vested interests one must start with the early land law, and its component notion of seisin. In this background the term "vested" will have a precise meaning; apart from this learning the term may mean any one of a number of things. In feudal law the only interests which could properly be called vested were freeholds—that is present fees, fees tail, life estates, and estates in remainder and reversion (the last will not be considered in this paper). Remainders were, according to the concepts of our forbears, present in their nature—in other words something one had, rather than something one was going to get. That one having such a present interest was not immediately entitled to possession was considered unimportant. Interests which were incapable of having the capacity of vestedness were the ignoble terms for years and the New Dealish executory limitations which later shouldered their way into the law of real property as a result of the Statute of Uses (1536) and the Statute of Wills (1540). As a consequence of this distinction, terms for years could be limited to commence in the future whereas it was only with the coming of the executory interest that a freehold could be limited to commence before another freehold came to an end. Perhaps this difference arose from the feeling that a term for years was, like a pile of rubbish, a clog on the land rather than an estate in it.

Finally must be observed the little-recognized rule that there could be no true remainder limited upon a term for years.[19] To illustrate: If Blackacre is conveyed to *A* for a thousand years, the grantor does not have a reversion, but the proper statement of title is to say that the grantor has a present fee *subject* to a term for years in *B*. If Blackacre is conveyed to *B* for a thousand years and then to *C* in fee, it is usual to say that *C* has the present fee subject to a term for a thousand years in *B*.[20] Finally if Blackacre were conveyed to *A* for life, then to *B* for ten years, then to

[19]Cunliffe v. Brancker, 3 Ch. Div. 393 (C. A. 1876).

[20]An unlikely intention but one which would be effectuated if expressed would be that the grantor retained the fee subject to a term for a thousand years in *B* and also subject to an executory interest to take effect in a thousand years in favor of *C* in fee. Gray, the Rule Against Perpetuities (3d ed. 1915) § 58; Simes, Law of Future Interests (1936) § 155.

C in fee, it would be improper to speak of *B's* interest as a remainder. In all likelihood the conveyance would be said to create a life estate in *A* followed by a vested remainder in fee to *C* which remainder was subject to a term for ten years in *B* to commence on the death of *A*.

Vested and Contingent Remainders in Land

> "An estate or interest is or becomes vested when, first, the person or persons, corporations, or body to whom or to which it is limited is or are ascertained and in existence and capable of being an alienee, secondly, the quantum of the estate and interest is ascertained and thirdly, all other events have happened to enable the estate or interest to come into possession at once subject to the determination at any time of the prior estates and interests."[21]

For purposes of the Rule against Perpetuities this will be found a remarkably workable definition of a vested remainder. It is to be noted that the first requisite of the vested remainder does not pertain to a devise in remainder to a class some but not all of whose members are ascertained. *Such a remainder is vested but subject to the Rule.*

> "A contingent remainder was, at common law, a limitation of an interest in real estate which might never take effect as a remainder owing to the circumstances that it was limited to an unascertained person, or limited to take effect upon an event other than the regular termination of the preceding particular estate."[22]

It is not necessary, however, to achieve an exact definition of vested and contingent remainders in the feudal law sense, even if such a demarcation can be attained.[23] Whether or not such a line can be drawn, certain distinctions can be made between vested and contingent remainders as they existed when the Rule originated. It is with these that this paper is fundamentally concerned.

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[21]Halsbury, Laws of England (2d ed. 1937) v. 25 § 176.

[22]Foulke, *Vested and Contingent Remainders and the Rule Against Perpetuities* (1908) 56 Pa. L. Rev. 245.

[23]Professor Simes doubts that it can, Simes, Law of Future Interests (1936) § 71.

The Elements of Vestedness

What feature makes a vested remainder socially more desirable than a contingent remainder? We turn to an appraisal of their various characteristics. Let us consider the two types of remainders from the following points of view: (1) Is the holder of the interest ascertained? (2) Is there a condition precedent to its coming into possession? (3) Is it alienable? (4) Is it capable of intestate devolution?

Probably the feature of contingent remainders most commonly found is met in those limited to unascertained persons, usually persons unascertained because not in being. The peril of tying up property forever is most imminent in this kind of remainder. Just the thing which the courts were astute to avoid in preventing the indestructible fee tail[24] would be possible if a gift "to my first born son for life, then to his male heir for life, then successively to the male heir of the last taker for life forever" were permitted.[25] On the other hand any number of vested remainders could not raise such a problem. If only vested remainders in land are limited, within the space of one lifetime the property will get into the hands of someone who can alienate the fee-simple.[26] Thus if Blackacre is devised to *A* for life, then to *B* for life, then to *C* for life and then to *D* in fee, the remainder in fee will come into possession within the space of the life of the longest liver of *A*, *B* and *C*.[27] As we have seen a remainder after an estate tail may be cut off at the pleasure of the tenant in tail who can convey a fee simple.

A remainder contingent because to an unascertained though living person will practically never fail to vest within a life in being and twenty-one years thereafter. Thus if Blackacre is

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[24]Taltarum's Case, Y. B., 12 Edw. IV 19 (1473).

[25]Such a limitation was rendered void after the estate to the first unborn taker by the Rule against Double Possibilities which arose from the same motives as the Rule against Perpetuities. The Rule against Double Possibilities is of no modern importance as it was never applied in America and is legislated out of existence in England, Simes, Law of Future Interests (1936) §§ 486-488.

[26]See Rundell, *Concentration Versus Distribution of the Power of Alienation* (1924) 2 Wis. L. Rev. 449, 452.

[27]This result is not the maximum time which the Rule permits before the fee must be alienable by one person or group of persons as co-tenants. Thus if Blackacre is given to *A*, a bachelor, for life, then to *A's* first born son for life, then to *D* and *E* in fee, the remainder in fee would not become an estate in possession before two lives had run their course. The interest to *A's* son would vest if at all, within the permissible period, *A's* life, but the remainder in fee would not become possessory until *A* and his son die. Is this anomalous?

devised to *A*, a bachelor, for life and then to *A's* first born son for life and then to such person living in Jackson as has the most children in the next ten years, the interest would not be void. It is, of course, possible that the gift to the living person be made upon a contingency which will not necessarily be discovered in his lifetime. So if Blackacre were conveyed to *A*, a bachelor, for life and then to his first born son for life and then to the person now living in Jackson who at the time of the longest liver of *A* and *A's* first born son has the largest number of lineal descendants. Assuming the remainder were not construed to be limited to persons living at the death of *A's* first born son, such a remainder would not necessarily vest within a life in being and twenty-one years. However, the policy that one person or group of persons should have complete power to alienate a fee will not be promoted by striking down such a remainder. This power would not come until the lapse of two consecutive rather than concurrent lives.[28] Moreover, as a practical matter no one would want such a limitation.

Conditions Precedent to the Vesting of Remainders

No more dangerous to the general policy that one person or a group of co-tenants should soon be capable of alienating the entire interest in land is the condition precedent to the taking effect of a remainder which makes the remainder contingent. Thus if property is limited to *A*, a bachelor for life, then to the first son of *A* and then to *B* if the Supreme Court holds the Securities and Exchange Act unconstitutional, *B* will get the complete power to alienate the *whole fee interest* just as soon as if there were no condition precedent to his taking other than the natural termination of the preceding interests. Whether *B* can alienate his future interest before its reduction to possession is the subject of the following section. However, the Rule would strike down the interest to *B*.[29] It is difficult to imagine interests subject to a condition precedent in *ascertained persons* which would involve greater dangers to alienability.

Alienability of Remainders

Alienability no longer can serve as a demarcation between vested and contingent remainders in land. Kales is authority for the statement that in feudal times the distinction between con-

[28]See note 27 *supra*.

[29]The reader who finds this anomalous may find comfort that Gray saw the possibility of occasional inconsistencies in the Rule. Gray, *Remoteness of Charitable Gifts* (1894) 7 Harv. L. Rev. 406, 408.

tingent and vested remainders lay in that only the latter were alienable.[30] The reason for this lay in the feeling that it smacked of champerty and maintenance to transfer a possibility. However this may be, by decision and statute the distinction has been obliterated and contingent remainders are almost everywhere alienable.[31] At this point it should be noted that such a change goes only to the extent of making alienation legally permissible and not practically possible.[32] To buy a contingent interest is a speculative venture which lacks the thrill of roulette. It seems safe to hazard the suggestion that even few gamblers would be willing to wait years before the success or failure of a venture could be ascertained. Conservative investment is more likely to run to "sure things"—such as are to be found on the stock market.

In consequence of the foregoing it seems that the modern Rule is to be rationalized, if at all, in reference to two desiderata. It seeks to make alienation possible by giving to one person or group of persons the power of complete disposal of property within a maximum time. This proceeds from a recognition that there is a great practical restraint on alienation in a situation in which several persons have distinct though alienable interests in the same property, particularly when the proportional values of the successive interests are not mathematically ascertainable, but are dependent upon such contingent circumstances as how long a particular life can be expected to last. How long will a hearty sexagenarian think his life expectancy? Secondly, an additional practical difficulty in the path of free alienation of property lies in the fact that there is no market for a contingent interest, if separately put on sale.[33]

Descendibility of Remainders

Vested and contingent remainders are generally transmissible; *i. e.*, will pass to heirs or devisees upon the death of named takers. By and large, one may say that in the absence of a contrary desire on the part of the testator they will always pass by force of intestacy. Such a contrary intention may be found where a remainder

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[30]Kales, Estates and Future Interests in Illinois (1920) § 118.

[31]Simes, Law of Future Interests (1936) §§ 708-714.

[32]Is this important? Has there been any market for either vested or contingent future interests.

[33]Since there has never been an objection made to joint tenancy in a present interest from the point of view of alienation, it is not considered that the fact that the Rule is satisfied if co-tenants can alienate the fee is anomalous.

is given on a contingency of survivorship; so when property is given to *A* for life and then to *B* if *B* survives *A*. Decisions finding an implied rather than an express condition of survivorship of remainders are extremely infrequent and probably not well reasoned. The use of the word "vested" to express transmissibility is very frequent. It is difficult, however, to see how a contingency of survivorship is objectionable to the policy of the Rule. Obviously such a contingency must be resolved within the permissible period.[34]

Thus it may be said by way of recapitulation that the only things inherent in the modern contingent remainder objectionable under the Rule are: the fact that it may be limited to an unborn person, and the fantastic possibility that it may be given to a born person ascertainable at a time later than his death.[35]

Terms for Years

Apparently the Rule has never been applied to terms for years, created to begin in the future. Gray felt that they should be considered bad under the Rule even though not limited upon a contingency and though of definite duration.[36] Gray did not articulate his reasons for this view and it is difficult to see how it is justified. Economically their value would seem to be ascertainable, moreover they are alienable and transmissible and therefore the purposes of alienability are probably served. Such is the view of Simes.[37] However neither of these learned workers in the field saw fit to mention that the period of the Rule would not seem to be logically suited to the evil if one exists[38] or that in view of the fact that only a handful of cases contain such a provision the

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[34]It is possible to give land to *A*, a bachelor, for life, then to the first born son of *A*, then to the children of such first born son of *A* living at his death. *Here the contingency of survivorship does not make the last interest bad, it is bad without the contingency.*

[35]Other demarcations have been achieved. In Easton v. Hall, 323 Ill. 397, 154 N. E. 216 (1926) a trust was provided for *A*, a bachelor, for life, then for his widow for life, then for *X* church. The will provided that "no title or interest in any of the several trust funds in my will created, or in the money or other property composing them, or in the income accruing therefrom, or any of its accumulations, shall vest in any beneficiary . . . . . during the continuance of this trust." It was held that since the widow was not necessarily a life in being the remainder to *X* church was void under the Rule, since it was not vested. The court did not say how the remainder was otherwise objectionable, and it is believed it was not. For an expression of an opposite view see Cowherd v. Fleming, 84 W. Va. 227, 100 S. E. 84 (1919) and Simes, Law of Future Interests (1936) § 70.

[36]Gray, the Rule Against Perpetuities (3d ed. 1915) § 319.

[37]Simes, Law of Future Interests (1936) § 510.

[38]Odell v. Odell, 11 Allen 1, 13 (Mass. 1865).

question is largely academic. Similarly there is no objection to a present term for years, of no matter what duration, followed by a gift of the fee to another. It is commonly said that such an interest is a vested remainder, but it was indicated above that it is more proper to style it a fee simple subject to a term for years. Certainly it can be said that such a fee has all of the important aspects of a vested remainder, however.[39] If a second term is granted immediately following a prior term, Gray does not doubt that the second term would be valid, no matter the duration of the prior term. He reasons that it is "vested"—in what sense he does not explain. One case holds with him in this view even though the second term was granted after the first had been long established.[40] If the second term is granted upon a condition precedent, it will be invalid for the same reasons and upon the same conditions as any other contingent and remote interest.[41] It may be guessed that the economic effect of terms limited to take effect in the future more than a life in being and twenty-one years from their creation but subject to no condition precedent is much like that of certain executory interests which will be later considered.[42]

Executory Limitations

"Shifting and springing uses and executory devices are all, without question, subject to the Rule against Perpetuities."[43] So it has been long stated by the commentators on this subject. Executory limitations being the outgrowth of statutes have not the metaphysical quality of being vested in interest before being vested in possession like common law remainders. May they not, however, have those features which make vested remainders unobjectionable to public policy?

Clearly an executory limitation may be given to a person not in being with all the attendant consequences which have been observed when this is done by way of contingent remainder. It is this capacity of the executory limitation—that it may be given to take effect remotely that led to the Rule. This, and the fact that it might at the same time be given upon an uncertain event, or to an unascertained person.

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[39]Gray seems to have been of opinion that such a fee after a long term of years might better have been held void. Suppose the fee were reserved? Gray, the Rule Against Perpetuities (3d ed. 1915) Appendix, § 973.

[40]Mann, Crossman & Paulin, Ltd. v. Registrar [1918] 1 Ch. 202, 117 L. T. R. (N. S.) 703.

[41]Redington v. Browne, L. R. 32 Ir. 347 (1893).

[42]*Infra* p. 184.

[43]Gray, the Rule Against Perpetuities (3d ed. 1915) § 317.

Probably the Rule would never have arisen if the worst limitation were "to *A* in fee but if the land is ever used for church purposes to *B*." This could substantially be done at common law by granting Blackacre to *A* and his heirs so long as it was never used for church purpose and then assigning the right of reverter after the determinable fee to *B*. Three things should be said of this suggestion: first, this could not be done by will because two instruments would be necessary.[44] Secondly, there is a conflict of authority as to whether possibilities of reverter are alienable. Thirdly, while no court has yet so held, a right of reverter might well be subject to the Rule.[45] It is certainly anomalous that the right of entry for condition broken is not destroyed by the Rule.[46]

A characteristic of the executory limitation—that it can be given to an unborn person resulting in keeping property in a family forever—is what makes it particularly objectionable. So much has been said of the similar objection to contingent remainders, that further discussion of this point seems unnecessary.[47]

Of course, an executory limitation can also be given to an ascertained person on a day certain. The extent to which the courts hold such an estate valid under the Rule we shall presently see. *Prima facie* it would seem that if Blackacre is conveyed to *A* in fee subject to an executory devise to *B* in fee to take effect in thirty years, the interest should not be subject to the Rule even though the interest is transmissible.[48]

Clearly executory limitations are fully as alienable today as contingent remainders.[49]

Transmissibility of Executory Interests

Whether there is a public policy against a non-transmissible future interest may well be doubted. The fact that an interest is not transmissible necessitates its vesting within a single life in being if at all. If the holder of a transmissible interest dies before it vests in possession, it is patent that the power of a single person to alienate the fee is thereby increased. On the other hand, if an

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[44]*But see* Hayden v. Stoughton, 5 Pick. 525 (Mass. 1827); Brigham v. Shattuck, 10 Pick. 305 (Mass. 1830); and Clapp v. Stoughton, 10 Pick. 462 (Mass. 1830) where rights of entry created by specific devise were held to pass under the residuary clause of the same instrument.

[45]Simes, Law of Future Interests (1936) § 507.

[46]*Id.* § 506.

[47]*Id.* § 514.

[48]*Accord, Id.* § 498.

[49]*Id.* § 714.

executory limitation is not transmissible, it is less salable as a future interest because its value depends upon the uncertainty of human life. Statistics from the market-place would seem necessary to appraise properly the difference made by such factors. One may doubt that there is a very great market for any future interest, so that the fact that an interest is *future* rather than that it is *conditional* is what makes for practical non-alienability.[50]

Transmissibility is, of course, dependent upon the desires of the creator of the interest. Certain rules of construction have very naturally grown up. Suppose a testator gives Blackacre to *A* in fee but thirty years after his death to *B* in fee. Is the interest transmissible? *Smell v. Dee*[51] seems to hold that the interest would not be descendible if the property were personalty. Constructionally, however, this devise seems indistinguishable from a devise to *B* in fee subject to a term for thirty years in *A*, or, indeed, from a devise to *A* for life and then to *B* in fee, in either of which cases *B's* estate would take the fee in the event *B* predeceased the time of distribution. There seems to be no authority covering this case for land and little for personalty.[52] *Pinbury v. Elkin*[53] holds that an executory devise of personalty, uncertain as to time of happening or as to its happening at all, is transmissible. Fearne says:

> "There still remains another property of executory devises to be taken notice of; which belongs to them in common with contingent remainders; what I mean is, that an executory interest, whether in real or personal estate, is transmissible to the representative of the devisee, when such devisee dies before the contingency happens; and if not before disposed of, will vest in such representative when the contingency happens."[54]

Professor Leach[55] points out that *Smell v. Dee* and *Pinbury v. Elkin* though purporting to follow the ecclesiastical law as stated by Swinburne[56] achieve exactly the reverse result.

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[50]The Rule against Perpetuities does not concern itself with this secondary meaning (transmissibility) of the word "vested". GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) § 118.

[51]2 Salk. 415, 91 Eng. Rep. 360 (Ch. 1707).

[52]Williams states that Smell v. Dee is law and cites in support Re Buxton, (1930) W. N. 85 which seems to have nothing to do with the problem. 3 WILLIAMS, EXECUTORS (12th ed. 1930) 795.

[53]2 Vern. 758, 23 Eng. Rep. 1095 (Ch. 1718). See also Carper v. Crowel, 149 Ill. 465, 36 N. E. 1040 (1894).

[54]FEARNE, CONTINGENT REMAINDERS (10th ed. 1844) 551-554.

[55]LEACH, CASES AND MATERIALS ON FUTURE INTERESTS (1935) 261, 332.

[56]SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS (1590) 172.

A particularized branch of this constructional problem arises when the uncertainty as to the time when an executory devise will become possessory depends upon an age limitation. It is safe to predict that without further circumstances the rule of *Pinbury v. Elkin* will not apply when the contingency is one of age. Thus if a testator provides "I want my son to have Blackacre when he reaches twenty-five", the interest will probably be held not to be transmissible. As a constructional matter one can see why this is so. The same is true if the interest is given "if he reaches twenty-five" or "at his age of twenty-five" though perhaps in the latter case there is not so much of the atmosphere that the testator wants his son to take *only* if he reaches twenty-five.[57] However, when such gifts are modified by the slightest changes of expression the "preference of the law for vestedness", a policy long observed by the courts, may make the interest transmissible.

> "In one Clobberie's Case it was held, that where one bequeathed a sum of money to a woman, at her age of twenty-one years, or day of marriage, to be paid unto her with interest, and she died before either, that the money should go to her executor; and was so decreed by my LORD CHANCELLOR FYNCH.
>
> "But he said, if money were bequeathed to one at his age of twenty-one years; if he dies before that age the money is lost.
>
> "On the other side, if money be given to one, to be paid at the age of twenty-one years; though, if the party dies before, it shall go to the executors."[58]

The holding of the case (that a gift of intermediate income will make the gift transmissible) when translated to common law dogma would seem to be that the legatee took the equivalent of an estate in fee[59] subject to a term for years in herself. There is an express direction against merger.[60] On this analysis it seems clear that the Rule has no application to such a devise or legacy.[61]

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[57]*But see* Boraston's Case, 3 Co. Rep. 16, 19, 76 Eng. Rep. 664 (1587).

[58]Actual report of Case of Clobberie, 2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677).

[59]As we have seen there is no fee in personalty.

[60]Such a direction will not be followed in England, Saunders v. Vautier, Cr. & Ph. 240, 41 Eng. Rep. 482 (1841), but may in America, Claflin v. Claflin, 149 Mass. 19, 20 N. E. 454 (1889).

[61]*But see* GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) c. 4.

It certainly should be said that no writer or case has been found which adopts this (or any other) feudalistic analysis of the limitation.

Typically unilluminating as to the nature of the interests created is the following:

> "Clobberie's Case holds that certain language means that an immediate interest is given to A, but that the actual transfer of the principal to the legatee shall not be made till a future time, and that this intent is lawful provided the postponement be not beyond the minority of the legatee."[62]

The second resolution of my Lord Chancellor is our general proposition that an executory limitation to take effect on the attainment of a certain age, without more, will not be transmissible.

The third resolution, a dictum which has been generally recognized, deserves attention. Suppose a testator provides: "I leave Blackacre to my grandson, John, conveyance to be made to him at his age of thirty." The result is spoken of as "A Vested Interest Subject to Postponement of Enjoyment." But what interests are created from a technical point of view? Seemingly John has an executory devise to take effect upon his thirtieth birthday. No quarrel is made with the result which makes the interest transmissible if John dies before the age of thirty.[63] There may well be force in the argument that the separation of the direction of gift from that as to when it is to be effective indicates that the testator meant that it should be transmissible. But it is denied that the fact that the gift is transmissible has anything to do with the question of whether John has more than a future interest. The only alternative to saying that John has a future interest is to say that he has a present fee subject to an estate for years in the heirs of the testator. Gray[64] and Simes[65] use language which would seem to indicate that the former is the correct interpretation. It is far less important to establish such an academic point than to note that scores of cases of this very

[62]Kales, *Vested Gifts to a Class and the Rule against Perpetuities* (1906) 19 HARV. L. REV. 598, 600. See also GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY (2d ed. 1895) § 112a.

[63]But see Bickersteth v. Shanu, [1936] A. C. 290, 105 L. J. P. 53, 154 L. T. Rep. 360.

[64]GRAY, THE RULE AGAINST PERPETUITIES (3d ed. 1915) § 797.

[65]SIMES, LAW OF FUTURE INTERESTS (1936) § 150.

sort are held valid under the Rule without a determination of whether an executory devise or a fee subject to a term for years or subject to a rent was created.

Another rule of which *Clobberie's Case* may be merely illustrative is that in *Boraston's Case*.[66] Here Blackacre was given to *A* and *B* for eight years and then to the executors of the testator until Hugh should reach twenty-one "and when said Hugh shall come to his age of twenty-one years, then I will he shall enjoy (Blackacre) to him and his heirs forever." It was held that Hugh's interest was descendible although he died before arriving at the age of twenty-one. It was Jarman's belief that the interests created were a fee simple subject to terms for years.[67]

Another constructional problem having nothing at all to do with the transmissibility of executory limitations is that whereby a condition apparently precedent is construed as creating a condition subsequent. Thus in *Edwards v. Hammond*[68] land was conveyed to the grantor for life "and after to the use of his eldest son and his heirs, if he live to the age of twenty-one years; provided and upon condition, that if he die before twenty-one that then it shall remain to the" grantor. It was held that the eldest son, though only seventeen, was entitled to the property upon the death of his father. Thus the conveyance gave the eldest son a vested remainder in fee subject to an executory shifting use if he died before twenty-one.

Equitable Interests in Land and Legal and Equitable Interests in Personalty

It is established that there can be no such thing as a remainder in personalty[69] or in equity.[70] Of course the equivalents of remainders in such property are permitted. It is enough to say that the same questions govern a determination as to whether they are subject to the Rule as those governing legal remainders. It may be added that the problems of remoteness are most often observable today in trusts of personalty.

Whether the period of the Rule is as well suited to gifts of personalty as those of land the writer does not venture to say.

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[66] 3 Co. Rep. 16, 76 Eng. Rep. 664 (1587).
[67] 2 Jarman, Wills (7th ed. 1930) 1345, 1346.
[68] 3 Lev. 132, 83 Eng. Rep. 614 (1683).
[69] Gray, the Rule Against Perpetuities (3d ed. 1915) § 117 and also Appendix F.
[70] *Id.* § 116.

The Downfall of *LEAKE V. ROBINSON*

Leake v. Robinson[71] decided in 1817, establishes that if a gift is made to such of the grandchildren of the testator as should reach twenty-five and there are no grandchildren of that age at his death, the whole gift will fail. Similarly if the gift is "to such of my grandchildren as shall reach twenty-one but if any grandchild dies under twenty-one leaving children who reach twenty-one such children shall take the share their parent would have taken per stirpes" it will be void, unless one of the grandchildren is twenty-one at the death of the testator.[72] As executory interests such limitations are bad. Courts sometimes save such interests, however, not by working exceptions to the Rule but by deciding that almost identical interests are not executory: *i. e.* are vested. The writer is unable to determine how the effect of an interest upon the alienability of the property in which it is limited can be altered by the name one gives to the interest. The vision of the courts has not always been similarly restricted.

Thus in *Carlberg v. State Savings Bank*[73] personalty was given to such of the testator's grandchildren as reach twenty-one and such of the children as reach twenty-one of his grandchildren who die under twenty-one, the latter taking the parent's share. It was provided that the interest should accumulate and pass with the principal. This last provision was held to have the same climate of vestedness as the intermediate interest which moved my Lord Chancellor Fynch in Clobberie's Case.[74] Said the court:

> "There is only one exception . . . . to the postponement for twenty-one years of the vesting of the share in a grandchild, and that exception is where the grandchild dies before it arrives at the age of twenty-one years and leaves living issue, in which event the share immediately vests in the descendants of the grandchild, although the enjoyment of the share is postponed until the descendants respectively arrive at their majority. The Rule against Perpetuities is satisfied if the future interest must vest within the time prescribed notwithstanding the enjoyment of the estate may be postponed."

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[71] 2 Mer. 363, 35 Eng. Rep. 979 (1817). See Leach, *The Rule against Perpetuities and Gifts to Classes* (1938) 51 Harv. L. Rev. 1329.

[72] Pearks v. Mosely, 5 App. Cas. 714 (1880); Gray, the Rule Against Perpetuities (3d ed. 1915) § 381.

[73] 312 Ill. 181, 143 N. E. 441 (1924).

[74] 2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677).

The same result has been reached if the gift is to "all my grandchildren, as they shall respectively arrive at the age of thirty years."[75] Thereby the grandchildren took a present fee subject to divestment on dying under thirty. The logical conclusion of such a holding would be that if a single grandchild were living at the testator's death he would take the whole fee immediately, subject to divestment *only* on dying under thirty and not subject to divestment on the birth of another grandchild. One may well wonder whether the testator would have been pleased with such a construction. A devise of land may be similarly saved.[76]

A consideration of the authorities on the point may well lead one to wonder whether courts realize the inroad such authorities make on the rule that class gifts to be good at all must be good as to every member of the class. On facts which seem to the writer indistinguishable some cases hold such class gifts void under the Rule[77] and some say they are good because vested.[78] And this without recognition of the existence of the opposite body of authority. Nor do the courts disclose why the vested interests are innocuous.

Payment of the Corpus When the Youngest Grandchild Reaches Twenty-Five

Not uncommon is the executory limitation to those members of a class living when the youngest reaches a certain age. The testator wants them all to get his bounty at the same time in order that none should have an economic advantage over another. Yet he is afraid of the consequences if any gets a share before a certain degree of maturity has been attained. "Let the older ones wait", says he. "Wait and be void", say the courts. Not necessarily. A matter of income will make such a limitation good as a present fee subject to a term for years of indefinite duration. Or, perhaps, income will merely make a good executory limitation where a bad one was before. It is enough for the court to hold the interest vested without inquiring into this matter.

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[75]Howe v. Hodge, 152 Ill. 252, 38 N. E. 1083 (1894).

[76]Farmer v. Francis, 2 Bing. 151, 130 Eng. Rep. 263 (1824); 2 Sim. & St. 505, 57 Eng. Rep. 439 (1826).

[77]Vaudry v. Geddes, 1 Russ. & My. 203, 39 Eng. Rep. 78 (1830); Judd v. Judd, 3 Sim. 525, 57 Eng. Rep. 1095 (1830); Patching v. Barnett, 49 L. R. Ch. 74 (1880).

[78]Farmer v. Francis, 2 Sim. & St. 505, 57 Eng. Rep. 439 (1823); Bland v. Williams, 3 My. & K. 411, 40 Eng. Rep. 156 (1834); Bute v. Harman, 9 Beav. 320, 50 Eng. Rep. 367 (1846); *In re* Beavan's Trust, 56 L. J. Ch. 652, 34 Ch. D. 716, 35 Eng. Rep. 400 (1887).

Thus in *Story v. First National Bank*[79] the testator left a trust for his children, ordering distribution to be made when the youngest child reached the age of thirty and providing that if any child died under thirty his share should go to such child's bodily heirs when the youngest child of such child of the testator dying under thirty should reach thirty. From the above bequest was excluded the testator's daughter Kate Agnes Story Burch. She was to receive income on one share of the testator's estate for all her children until her youngest child should reach thirty when the share on which their mother took income for them was to be divided among such children. The court had no difficulty in upholding the trust for those in being at the testator's death.

> "To strike down the will because of the possibility of either of these contingencies (the death of a child of the testator other than Kate Agnes Story Burch or the birth of a child to her after the death of the testator) arising would defeat every purpose of the testator as to his wife and children, would destroy the bequest for the benefit of the children in being of Kate Agnes Story Burch and would destroy the contingent bequest for the benefit of any grandchild that may come into being under either contingency for which the will is to be set aside. If no grandchild came into being under either contingency then the entire estate is vested and can be distributed under the will as it is not contended that any law would be violated. It would be highly improper to strike a will down because of a contingency that may never arise and if it should arise it may do nothing more than accelerate the enjoyment of the gift."

Even more striking examples of the willingness of courts to seize at a straw to hold such a gift good are to be found.[80] In upholding such a gift the traditional lingo used by the craft to describe the result of *Clobberie's Case*[81] is employed.[82]

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[79]115 Fla. 436, 156 So. 101 (1934).

[80]McKibben v. Pioneer Trust and Savings Bank, 365 Ill. 369, 6 N. E. (2d) 619 (1937).

[81]2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677).

[82]Time for payment was deferred, Endsley v. Hagey, 301 Pa. 158, 151 Atl. 799 (1930); noted in (1931) 29 MICH. L. REV. 643. The time of payment was postponed or attempted to be . . . . , Johnson's Trustees v. Johnson, 96 Ky. 391, 79 S. W. 293 (1904). The bequest vested at the death of the testator, the enjoyment being postponed during the lives of the life tenants and, as it develops, during the period of accumulation, Curtis v. Maryland Baptist Union Ass'n, 5 A. (2d) 836 (Md. 1939). But see Hall v. Hall, 123 Mass. 120 (1877).

Limitations to Take Effect at a Time Certain

Suppose Blackacre is conveyed to *A* in fee subject to an executory limitation in favor of *B* to take effect in twenty-five years or again suppose the limitation "$1,000 to *C* twenty-five years after my death". What can be said for holding such interests void? Unless they are not transmissible, and it is believed that a modern court would hold them transmissible, they have all the attributes of vested remainders after life estates.[83] Indeed they are probably less of an economic impediment upon alienability than vested remainders because their falling into possession will never be dependent upon the effectiveness of an iron lung. Freund[84] feels that it would be anomalous if a legacy to take effect twenty-five years after the testator's death were held bad but a debt to mature at that time were upheld. While he feels that such a legacy would probably be held bad he reconciles himself:

> "The importance of any such rule is much diminished by the fact that remoteness without some element of contingency is of infrequent occurrence outside of corporate transactions."

Gray has only the following to say on the subject:

> "Thus an estate to *A* and his heirs, to begin from a day fifty years after the testator's death, is too remote, although the event upon which it depends is certain to occur."[85]

Simes feels that such interests ought not to be held void, but he is not sanguine that they would not be.[86] He finds a note of hope in the decision of *Nicoll v. Morton*,[87] however. Here by a codicil the testator gave his estate in trust for his wife for life and directed that twenty-five years after his death or at the death of his wife if she should live so long, the estate should be divided into four parts. Two were to be paid to two named grandchildren and the testator's daughter was to take the income on the other two for life, and on her death they also were to pass to the two grandchildren. It was provided generally that if either grandchild died before the time for distribution without issue his presumptive

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[83]Obviously non-transmissible interests are always valid.
[84]*Three Suggestions Concerning Future Interests* (1920) 33 Harv. L. Rev. 526, 535.
[85]Gray, the Rule Against Perpetuities (3d ed. 1915) § 174 n. 2.
[86]Simes, the Law of Future Interests (1936) § 498.
[87]332 Ill. 533, 164 N. E. 5 (1928).

share should pass to the surviving grandchild. Said Commissioner Partlow, holding the limitation valid, in an opinion adopted by the court:

> ". . . . If one of the appellants died before the time for distribution the survivor took all of the estate. There was no limitation over even to the heirs of one not surviving . . . . The will did not require that they be in existence at the time of distribution or that they should attain a certain age or meet any qualification of any nature whatever."

In *Belfield v. Booth*[88] a trust was set up to last fourteen years from the time when "the executor has settled with the judge of probate" to pay annuities from the income to named beneficiaries and then at the expiration of the trust to divide the principal equally among the living grandchildren of *B*, and *C*, a named person, who was to take as a member of the class. It was held that the trust was valid because (1) the trust period was not too long and (2) because it vested at the inception of the trust. Said the court of the second point:

> "But even if the period were one that might endure to a time beyond twenty-one years after the decease of the testator, the estate vested at his decease in a definite class cannot be divested by any change in the membership of that class. It remains the same class though composed from time to time of different individuals."

A few cases of a similar nature are to be found.[89] Can it be that none of these cases concern executory limitations, but that by the rules of *Clobberie's Case*[90] or *Boraston's Case*[91] the interests are construed to be fees subject to terms for years? The effect when a term is created *in futuro*, which seems similar in principle, has been discussed.[92]

No attempt is made to classify or rationalize *Strout v. Strout*.[93] Here the testatrix gave "to Mildred Strout to hold in trust, all the

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[88]63 Conn. 299, 27 Atl. 585 (1893).

[89]Armstrong v. Barber, 239 Ill. 389, 88 N. E. 246 (1909); O'Hare v. Johnston, 273 Ill. 458, 113 N. E. 127 (1916); Sears v. Putnam, 102 Mass. 5 (1869); Codman v. Brigham, 187 Mass. 309, 72 N. E. 1008 (1905); Cowherd v. Fleming, 84 W. Va. 227, 100 S. E. 84 (1919).

[90]2 Vent. 342, 86 Eng. Rep. 476 (Ch. 1677).

[91]3 Co. Rep. 16, 19, 76 Eng. Rep. 664 (1587). See Note 19 *supra*.

[92]Note 13 *supra*.

[93]117 Me. 357, 104 Atl. 577 (1918).

rest and residue of my personal property, and I wish it to be distributed to the children of Leon B. Strout and herself or their descendants and at such times as she sees fit for their best benefit." Said the court holding the interest good:

> ". . . . all the interests legal and equitable, vested at the death of the testatrix. The bequest was present and absolute; the time of payment only is postponed."

It is not suggested that this gift was necessarily bad under the Rule against Perpetuities, but the court's conception of vestedness is certainly a new departure.

Conclusion

From the foregoing it seems clear that the Rule is not the articulation of any carefully defined economic rubric. At its foundation lies the assumption that common law processes are well adapted to determine the existence of practical restraints on transferability. The result has been a solidification of rules which may have a direct, an inverse or no relation to the end of economic transferability. The Rule is now developing by the syllogistic application of ill-considered premises.[94]

Certain instances have been observed in which it seems that alienability has not been aided by the Rule. However, the aim of Lord Nottingham in 1682 is applicable to our times. The progress made by the common law in two and one half centruies of routing out "inconveniences" might well be the subject of study by competent experts. The course of the common law is to make of the conclusions of the present the premises of the future. If progress up to this time has been economically sound, the Rule is not likely to be worse in the future.[95] If the economics of our judges has been unsound, the Rule now and henceforth is likely to be "full of sound and fury signifying nothing."

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[94]See Leach, *Powers of Sale in Trustees and the Rule against Perpetuities* (1934) 47 Harv. L. Rev. 948, 949.

[95]See Bordwell, *Alienability and Perpetuities* (1938) 23 Iowa L. Rev. 1, 23.

THE REVENUE PROBLEM IN MISSISSIPPI

by

*Roscoe Arant**

INTRODUCTION

Those citizens who have given serious thought to the fiscal problems in Mississippi appreciate the fact that the State is confronted with a serious matter in its search for additional revenue with which to carry on its program of expanding public service. The directions along which different kinds of governmental activities develop are a matter of legislative discretion. But in whatever program of service the State engages it is always confronted with the problem of finance. The forms that public spending takes frequently create serious economic problems. But in many instances, the problem of revenue becomes more serious than that of public spending, and certainly more difficult. It is much easier to spend than it is to pay. Sometimes states are fortunate enough in the supply of their resources that the problem of revenue is largely one of choosing the form of tax and the rate to be applied. But in many other cases, however, because of limited wealth, there is not much opportunity for choice between sources or forms of income. In such cases the problem becomes more difficult, and a more careful examination of every available source becomes imperative, both for the purpose of locating whatever dollars that have not yet been found, and for the purpose of collecting them in such way that the ill effects produced may not be more than enough to offset the benefits to be gained.

The government of Mississippi is, at present, employing every important form of taxation available to it, and at rates that undoubtedly, in most cases, cannot stand appreciable increase without uneconomic or undesirable social results. With its present budget of approximately $19,000,000 per year, it is barely breaking even.

The legislature, when it meets in January, will undoubtedly be confronted with demands for additional appropriations, some

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of which may run into large figures. The close impingement of the public budget upon the resources of the State is going to demand that the legislature scrutinize every possible nook and corner for whatever income may be available. And the limitation on resources is such that it is going to require the utmost care and the very highest order of statesmanship to reasonably insure that additional revenues are procured in such manner that the resulting losses will not outweigh the net gain.

Within the past few weeks I have given considerable thought to the State's revenue problems. Just as other citizens of the State who are seriously interested in the matter have done, I have attempted to give some study to every possible major source of income, and to ascertain just where the State could find appreciable amounts of revenue, and where, in a few significant places, the structure could be somewhat altered in the interest of simplicity so that both the State and the taxpayer could have a better understanding of just where they stand.

In the following discussion I am going to take up several of these taxes and discuss them from the standpoint of revenue and simplification. In doing so, I want to acknowledge the courtesies of the State Tax Commission of Mississippi and also of the tax commissions and other public officials of various other states in supplying me with information. Much of the data has been available in bulletin form, and some of it has been especially prepared in response to direct inquiry. But the interpretation of such information is my own, as are all conclusions, generalizations, or suggestions, and I assume full responsibility for every one of them.

From the time Mississippi was a territory until within the past fifteen years the only important type of tax in the State was the property tax. But for a number of reasons, which need not be discussed here, the property tax, as traditionally administered, has not proved adequate for the rapidly rising demands of the State. This has been particularly true within the past four decades. Because of the growing inadequacy of the property tax the State has attempted to supplement it, and in some cases even to replace it with various other kinds of taxes, among the most important of which are the income tax, the automobile license tax, the sales tax, the gasoline tax, the tax on beverages, and the various privilege taxes.

With the increased use of these taxes the relative importance of the property tax has been greatly reduced. In fact, it has diminished not only in relative importance, but in absolute importance, as is shown by a general decline in assessed property values for the State from $766,284,113 in 1926 to $551,486,218 in 1938. The decreasing dependence upon the property tax and the growing emphasis upon other forms of taxes has caused the State to resort to those taxes to such an extent that in the face of still greater needs for revenue, it appears that the time has now come when it is necessary to examine the most important of them for the purpose of ascertaining just what adjustments may be made in the case of each one to enlarge the revenue it produces with the least probable economic or social disadvantage.

The Sales Tax

The present sales tax, which has been in operation in Mississippi since 1932, produces more revenue for state purposes than any other source. For the biennium, July 1, 1936-June 30, 1938, it produced 34.73 per cent of the general fund of the state.[1] The yield for the fiscal year closing June 30, 1938, was $6,056,650.44. Due to large revenues that the sales tax has produced many persons have become very optimistic over its potentialities as a source of state receipts. I have, on a number of occasions, heard it said that a sales tax of 5 per cent would make it possible to repeal all other taxes, and that there would then be ample funds in the treasury for other things. Such optimism can only come from a lack of understanding of the manner in which the sales tax operates or the effects that it produces.

For the purpose of discussing the revenue possibilities of the so-called sales tax, it is first necessary to understand from what sources this tax is derived. In the first place, contrary to a widely held notion, this tax was not enacted as a sales tax *per se,* but as a "tax upon the privilege of engaging in certain businesses in Mississippi",[2] and the amount of the tax was measured upon the gross sales of all businesses affected. The reason this tax is called a retail sales tax is that the preponderance of it falls on the sales of retail merchants. But by statute, with a limited number of exceptions, it falls on practically every kind of business within the State, consisting of both wholesale and retail merchandizing,

[1]State Tax Commission, *Service Bulletin* 19, March, 1939, p. 7.
[2]Miss. Laws 1932 c. 90 p. 176.

the production or severance of natural resources, manufacturing, and public utilities, with rates ranging from ⅛ of 1 per cent upon the gross receipts of wholesalers and jobbers and manufacturers of feed stuff to 2½ per cent on the producers of natural gas. Any possibilities of increased productivity of this tax would have to take into account the particular kind of business, the burden of the present tax rate, and the probable effect of an increase in the tax upon that particular kind of business. Consequently, these classes of businesses should be considered separately, and not as a whole.

Natural Gas. With reference to the business on which the 2½% per cent rate now falls, that rate applies only to the production of natural gas. During the calendar year of 1938 this tax paid only $3,308.54, or .06 per cent of the total gross income tax, and does not offer an appreciable source of increased revenue. Besides, there is evidence that the supply of natural gas in Mississippi is being depleted, even to the point of exhaustion.

Natural Resources. The businesses on which the 2 per cent rate falls is primarily the retail mercantile business and the retail sales of all public utilities. It is on this account that the tax has become popularly known as the retail sales tax. Nevertheless this rate also falls on other businesses, as cotton gins, the production of timber and other natural resources, other than natural gas. I have not had opportunity to study either the probable effect of an increase in the tax rate on the extraction of these natural resources, nor as to whether such a tax would be productive of much increase in revenue. There is this thought, however—a very large tax on these industries may have the effect of slowing up production. In fact a tax rate on businesses of this kind may be large enough to produce less revenue than a smaller rate. If the State desires to conserve its timber supplies, for example, a heavy tax on timber extraction would produce that result.

Within the past few months, since the development of a few commercial oil wells within the State, much discussion has passed around concerning the revenue possibilities of a production tax on petroleum. Attention is called to the fact that this type of production is already subject to the 2 per cent gross income tax on natural resources. It may be that later on the profits of the business would warrant an increase in this rate. But much care should be used lest an excessive tax retard the development of a new industry before it reaches maturity.

Retail Merchants. The principal kind of business on which the 2 per cent gross income tax falls is the retail mercantile business and the retail sales of public utilities. I am not going to attempt to do any fine spinning of economic theory as to the shifting or incidence of the retail sales tax, nor become involved in a long discussion as to why it is an unfair tax and falls with greater relative hardship on poor people than on people of large incomes. There are frequently times when there is enough benefit at stake to justify the payment of heavy prices. A heavy sales tax is a heavy price. Nevertheless, when a state is hard up for revenue, and the funds are to be spent for such public welfare measures as the reduction of illiteracy, disease, and want, there is involved not only decent standards of living, but a high type of citizenship as well, all of which may be worth even the cost of a sales tax, because in such cases those who bear the brunt of the burden receive a large part of the benefits.

But even leaving out of consideration the entire question of ethical values, living standards, *et cetera,* there is the still more practical question of whether the State of Mississippi could levy and collect an increase over the present 2 per cent on all retail sales. The idea is too common that it is easy for a retail merchant to pass a sales tax on to his customers. If such shifting were easy, the possibility of increasing its yield would be less dubious. Within the past few months I have talked with a large number of merchants in different parts of the State. A great many of them are successful in passing the tax to their customers, but a great many are not. I frankly doubt if more than 10 per cent of the retail merchants, including the utilities, of Mississippi are able to collect from their customers more than 75 per cent of their sales taxes. In fact I believe that such an estimate is very liberal.

The principal reasons for the inability of retail merchants to collect this tax from their customers, I think, are two. First, thousand of them run into competition with out-of-state merchants and mail order houses who do not pay a sales tax, and therefore do not charge a sales tax. Then there are thousands who lack the moral courage to ask their customers for the extra cent or two, or for the necessary tokens. The first group of merchants are found particularly in the northern part of the State where they run into competition with merchants in Memphis or other Tennessee towns. I had never had a great lot of confidence in the charge that non-taxed merchants in other states made it difficult for taxed mer-

chants to collect the sales tax until I had opportunity to see it in operation. I regard a hardware merchant as somewhat above the average small merchant in business ability and conduct. Yet an above-the-average hardware merchant in a North Mississippi town told me that his customers had told him so many times of what they could get this or that for in Memphis, or by ordering from Sears, Roebuck and Company or from Montgomery Ward and Company, and that he was actually losing trade, so that he had almost quit trying to collect the tax. Just recently, a personal friend of mine, one of the best hardware merchants in Oxford, told me that because of so many customers buying in Memphis on occasional trips, or because of their sending for goods by friends who were going to Memphis, that he and his competitors alike had almost quit trying to collect the tax and had gone to paying it themselves without further question. An above-the-average grocery merchant in Oxford told me just recently that he had little trouble collecting the tax on his charge accounts, but that he had quit trying to collect from his cash customers.

I am inclined to believe that the failure of merchants to collect this tax after they get far enough away from the Tennessee line to be limited by the competition of merchants in that state is due primarily to lack of moral courage. A few such merchants in a town will make it difficult for the others. As evidence that it can be collected, without the resort to hidden measures, one need only go to the stores on the main streets of Jackson where he will be asked for the extra few cents or for the tokens, and he will pay it if he gets the goods. But the main streets of Jackson do not extend all over Mississippi, and there are enough merchants in all parts of the State who are sufficiently lacking in the necessary courage that they are, in large numbers, bearing the burden. When the tax burden becomes sufficiently great, people resort to all kinds of schemes to lighten its weight, even to such measures as short-weighting or short-counting customers.

Many devices are resorted to to defraud the State. I know of cases where merchants employed expert accountants to set up for them crooked sets of books on which to base fraudulent tax returns. Subsequently, representatives of the Tax Commission located the frauds, and the delinquent taxes with penalties were collected. The less imposing, or less highly developed, plans for evading the sales tax would run into large numbers.

In any state imposing a sales tax, were it possible to determine the entire value of all gross sales, and to enforce the payment of a tax by the many merchants, who, because of their lack of courage to ask their customers for the extra charge, the probable result would be to reduce large numbers of them to relief roles. The very nature of a sales tax requires good judgment and a statesmanship of the very highest order for its administration. Undoubtedly, the presence of these factors in tax administration in Mississippi account for the fact that this State has enjoyed a greater success with its sales tax than most other states that have attempted its use. Nevertheless, there are always limits to the possibilities in every type of administration. And in Mississippi, although the Tax Commission has been able to administer a 2 per cent sales tax with a high degree of success, I do not believe the State could get by with a 3 per cent tax with equal success.

In this connection, I believe it is in point to interject a brief statement regarding the use of tokens in the administration of the retail sales tax. There has been much misunderstanding regarding the origin of the token law in Mississippi. This law is not a part of the privilege tax on gross income, or the sales tax, as originally enacted. In 1936, committees of merchants representing the retail mercantile interests of the State went to Jackson, had their proposed bill drawn, obtained an opinion on its constitutionality, and presented it to the legislature. On petition of these merchants the legislature passed that bill which is Mississippi's token law. In other words, the present token law is the merchant's law passed at their request. The subsequent operation of this law has produced a large amount of discussion.

There is no getting around the fact that the charging and paying of tokens is a nuisance, both to the merchants and to the customers. Nevertheless, there is something to be said in favor of the token, assuming that the retail sales tax is to be retained in the State's revenue system. From the standpoint of the customer, it is probably a less nuisance, through the use of the token, to pay the correct tax on purchases, which is usually possible when the token is used than to pay several times the correct tax on small, or fractions of half-dollar purchases, as is done when merchants ask for 1 cent on 15 cent or 20 cent purchases or for 2 cents on 65 cent or 70 cent purchases, for example. From the standpoint of the merchant, it does provide a more convenient vehicle for the collection of the tax for those who have the courage to use them.

Although the token is a nuisance, when the customer realizes that the merchant is merely complying with the law, his resistance will weaken much more readily than when he knows that the charge is not required. In other words, it probably does save many merchants from considerable financial loss, and may in fact enable others to continue to operate that would otherwise have to go out of business.

There is one possibility for increased returns from the sales tax on retail merchants, and one that does not involve an increase in the tax rate. It involves a problem of administration. Experience has shown that effective sales tax administration requires a frequent check-up on the merchants by representatives of the administrative authorities. In Mississippi, on occasions in the past, the legislature has increased the appropriations to the Tax Commission sufficiently to enable it to increase the number of its field representatives who audit taxpayers' books and collect delinquent accounts. On each occasion, when such increases in the field staff have been arranged, the increase has always been followed by increases in revenue receipts. An adequate field force makes it possible for the auditors and collectors to make audits and collections before a taxpayer becomes so far delinquent that he has either gone out of business, or that his delinquency has become so large that he is without the necessary means to liquidate his account to the State. Of course, the fact that such increases in field force have been able to reduce delinquency in the past does not mean that the process could continue indefinitely. The point is bound to be ultimately reached when the State is sufficiently well covered that further increases in the collections are not sufficient to warrant additions to the staff. I do not know whether that point has yet been reached or not, and I have not inquired of the Commission as to whether such additions would probably be warranted. Nevertheless, it is an angle that is worth consideration.

The businesses on which the rate of 1 per cent is levied on their gross income are the retailers of milk, automobiles, trucks, and tractors; the manufacturers of bottle soft drinks, brick, building tile, cement, and cement and clay products; and the sale of industrial gas and electricity. The total tax paid by these concerns for the calendar year 1938 was $356,101.32, or 6.03 per cent of the total tax collected on gross incomes in that year. The proportion of this amount that was paid by each of these classes of taxpayers, I do not know. But since there are considerable differences

in these different classes of industries, any consideration as to their powers to pay increased taxes should take into account their differences in character and circumstances.

Milk Dealers. From the standpoint of an increase in the tax on the sales of milk, the fact that the State is attempting to develop dairying as one of its basic industries, and that milk is a necessity of life should be recognized. In fact it may be that to increase the tax on the sales of milk would be both socially and economically unwise.

Industrial Gas and Electricity. From the standpoint of industrial development in general, it may also be unwise to lay a blanket increase on the tax on the sale of industrial gas and electricity. There are many small industries in the State that have a legitimate place in the State's economic development, that, due to lack of other forms of motive power, have to depend upon gas, and particularly electricity, and whose development may be considerably retarded by an excessive tax on industrial electricity.

Bottlers of Soft Drinks. As for the manufacturers of bottled soft drinks, that industry is not a basic industry of the State, and it may be that the general profits of the business are sufficiently large to justify taking it out of the 1 per cent group and subjecting it to a tax of 1½ per cent, or even more, without seriously injuring the production of cold drinks or of making the rate heavy enough to be easily shifted to the retailers, or certainly to be made burdensome on the consumer. In the shifting of a tax it should always be kept in mind that a light tax is much less likely to be transferred to a purchaser than is a heavy tax. It may be possible to increase the tax on bottlers sufficiently to appreciably increase the state revenue without, at the same time, making the rate so high as to lose whatever advantage there is to having them locate within the State.

Manufacturers of Brick, Building Tile, Cement, and Cement and Clay Products. The 1 per cent tax on the manufacture of brick, building tile, cement, and cement and clay products should not be increased without further investigation. If those industries are based on the natural resources of the State, and Mississippi is attempting to develop its industrial possibilities, it should undoubtedly begin with those industries in which it has resources to offer, and which may therefore become basic in the industrial development. Certainly any industry should be required to pay its

cost of maintenance and operation, and the expense of government is one of those costs. To this general rule, I do not believe any profit-making industry is entitled to claim an exception. But as to whether the conditions in this type of industry, and in the present stage of its development in Mississippi, justifies an increase in the present tax on it, account should certainly be taken of at least two factors—first, the general profitableness of the business now, and second, the effect on its future possibilities as among the state's basic industries.

Contractors and Retailers of Motor Vehicles. As for the 1 per cent tax on contractors, and particularly on the retail sale of motor vehicles, it is difficult to see why they should be taxed at only 1 per cent while retail sales in general are taxed at 2 per cent. Retailed automobiles, trucks and tractors, with certain exceptions, go to the same people as retailed groceries or clothes. If the ordinary necessities of life justify a tax of 2 per cent, it certainly seems reasonable that the selling of motor vehicles should not be taxed at a lower rate. With the respect to the effect on the retailers themselves, a tax of 2 per cent should not be more burdensome upon them than upon the retailers of general merchandise, because, due to the difference in the very character and organization of the two types of merchandising, and to the operation of the *use* tax on out-of-state purchases, it would be easier for automobile dealers to pass the tax to their customers than for general retail dealers to pass it on to theirs. During the calendar year 1938, automobile dealers paid to the State $180,672.36. If the rate were raised from 1 per cent to 2 per cent, the returns should be approximately twice that amount.

Manufacturers in General. Manufacturers in general, with the exception of the manufacturers of feed and feed stuffs, brick, tile, cement, and cement and clay products, and bottled soft drinks, are required by the present law to pay ¼ of 1 per cent on all of their gross receipts. These industries include the manufacturers of drain tile and sewer pipes, cotton seed oil and cotton seed products, and all other manufacturing except those mentioned above. During the calendar year 1938 they paid to the State the total amount of $494,176.21. If the rate on these concerns were increased from ¼ of 1 per cent to ½ of 1 per cent, they should probably pay approximately $500,000 more, and the tax may not then be excessive. The question will, of course, be raised as to whether this additional ¼ of 1 per cent tax would not cause such manufacturers to lose con-

siderable business to concerns outside of the State. My personal reaction is that it would not. Such an increase would involve only 25 cents on the $100, and it is doubtful if an appreciable number of the purchasers of those materials would go elsewhere for that difference. Then too, there is always the question of the readiness with which customers can be made to pay a tax on transfer. It certainly is not easy in the case of a retail sales tax, and it may not be easy in the case of the manufacturers. In all probability the weight of a ¼ of 1 per cent increase in the tax on these manufacturers would be divided between the manufacturers and their customers, so that it would not bear excessively burdensome on either.

Manufacturers of Feed and Feed Stuffs. The question may also be raised as to whether manufacturers of feed and feed stuffs, an industry which now pays a tax of ⅛ of 1 per cent on its gross income should not be taken out of that class and put in the class with other manufacturers who bear a tax of ¼ of 1 per cent. There may be a sound reason for taxing this industry at one-half the rate of other manufacturers—but certainly such reason is not self-evident.

Wholesalers and Jobbers. The final class of concerns subject to the gross income tax consists of the wholesalers and jobbers in the State. They bear a tax of ⅛ of 1 per cent. During the fiscal year of 1938 they paid to the state, (including the amount paid by the manufacturers of feed and feed stuffs, who are also subjected in the ⅛ of 1 per cent rate), a total of $304,031.95. It is probable that this tax could also stand an increase, possibly another ⅛ of 1 per cent, which should bring to the State's treasury another $300,000. Here again the question arises as to the effect on trade. Undoubtedly a *heavy* tax on local wholesalers would cause a great many of their customers to switch their orders to out of state dealers. I certainly believe that a 2 per cent tax, for example, on the wholesalers would produce that effect. In fact a tax of that rate would probably be sufficient to run the wholesale business out of Mississippi almost entirely. But a tax of ⅛ of 1 per cent is only 12½ cents on the $100, and even though the wholesalers were able to charge that amount to their customers, it is still doubtful if they would lose any business at all to out-of-state competition. More than likely, it would be fairly well distributed between the wholesalers and their customers and neither of them be seriously affected.

The Income Tax

Another substantial source of revenue in Mississippi is the income tax. For the fiscal year 1938-1939, this tax produced $1,709,848.19, or approximately 7 per cent of the general funds of the State. Mississippi is a state of small income. The State also being almost entirely rural, with few industries of importance, the distribution of wealth and income is such that there are few large incomes. In fact, under the present law, which grants exemptions of $1,000 for single persons and corporations and $2,500 for married persons, there were only 7,610 returns for personal income taxes for the nine months, January 1, 1939-September 30, 1939, and 852 returns for estates and corporations for the same period. The result is that the State will not, for many years to come, be able to look to the income tax as a major source of revenue, comparable to what may be expected in the industrial states of the North and East.

Nevertheless, there are important possibilities for increases in the income tax receipts. But for an intelligent discussion of the income tax, it will be necessary to consider the tax on personal income and the tax on corporate income separately. In some states little distinction is recognized between persons and corporations for tax purposes. Mississippi is one of those states, and with the exception of the franchise tax, applies the same plan of taxation to both persons and corporations. But that there is a distinction between the two has long been recognized in the tax systems of many states and the federal government as well, and while it is not considered necessary to expand on the grounds for this distinction here, the fact should be recognized that the distinction is almost universally accepted.

The Personal Income Tax. The tax on personal incomes, as distinguished from the tax on estate and corporate incomes, for the first nine months of the present year produced a total revenue of $629,216. I am going to outline three different types of changes that could be made in the individual income tax that would increase its yield.

a. An increase in the income tax yield could be achieved by either a reduction of the exemptions, or a raising of the rates, or a combination of both. Prior to the present law, the exemptions were $750 for single persons, $1,500 for married persons and $200 each for dependents instead of the present $1,000 for single per-

sons, $2,500 for married people and $400 for dependents. But the rates were also lower—2.5 per cent instead of the present 3 per cent rate on the first $2,000 of taxable income, 3.5 per cent instead of the present 4 per cent on the next $3,000, 5 per cent instead of the present 5.5 per cent on the next $10,000 and 6 per cent instead of the present 6.5 per cent on all over $15,000.

On account of the weight of all other forms of taxation it will probably be unwise to attempt to increase the rates on incomes in Mississippi beyond what they now are. Because where there are many persons in the low income brackets the cost of administration considerably increases, I assume that the reason for increasing the exemptions in 1938 was the cost of administration. It may be that the increased receipts did not justify the added expense. But if, in the light of the Tax Commission's previous experience, the administrative expense and other problems in handling a large number of low incomes are not too great, there can certainly be no objection from the standpoint of sound logic or economics. It is probable that a restoration of the former exemption schedule could be restored with the present tax rate without being unduly burdensome. If the present rates should appear to be a little heavy on the low brackets, under a plan of reduced exemptions, the difficulty could be overcome by a reduction of the rates on the low brackets and an offsetting increase in the rates on the upper brackets, for example:

Taxable Income	Rate of Tax
$1,000 or less	1½%
next $1,500	2%
next 2,000	3%
next 2,500	4%
next 3,000	5%
next 5,000	6%
all over $15,000	7%

There is much to be said in favor of a schedule such as that outlined above, where the rates begin low on low incomes and gradually increase as the incomes grow larger. It does appear to conform more accurately to gradual changes in taxpaying power with gradual increases in the taxable incomes.

As for the exemption for dependents, I merely call attention to the fact that $400 is considerably higher than that found in a number of states. I do not have the list at hand, but at the present

time there are eleven states in the nation that allow only $200 for dependents. As to whether they are too low or not, or as to whether $400 is too much in a rural state such as Mississippi, where incomes average low, I shall not attempt to discuss here.

b. An increase in the yield from the personal income tax could be achieved by a slight change in the method of computing the tax without any change in either the present exemptions, brackets, or rates. This change would consist of first calculating the tax on the entire net income, and then allowing the value of the usual deductions as a tax exemption, rather than under the present method of computation where deductions are first made from income and applying the tax rates to the balance of the net income. The following calculation based on an assumed income of $20,000, present exemptions, and present tax rates, will serve to illustrate the difference in the two methods:

PRESENT METHOD OF CALCULATION

	$20,000	assumed total net income	
Less	2,500	deduction for married persons	
	17,500		
Less	400	deduction for one dependent	
	17,100	taxable net income	TAX PAID
Less	2,000	@ 3%	$ 60.00
	15,100		
Less	3,000	@ 4%	120.00
	12,100		
Less	10,000	@ 5.5%	550.00
	$2,100	@ 6.5%	136.50
		Total Tax Collected	$866.50

PROPOSED METHOD OF CALCULATION

			TAX PAID
	$20,000	assumed total net income	
Less	2,000	@ 3%	$ 60.00
	18,000		
Less	3,000	@ 4%	120.00
	15,000		
Less	10,000	@ 5.5%	550.00
	$ 5,000	@ 6.5%	325.00
		Total Tax Liability	$1,055.00
		Less exemptions for married persons, $2,500 @ 3%	75.00
			980.00
		Less exemption for one dependent, $400.00 @ 3%	12.00
		Total tax collected under proposed method	968.00
		Less tax collected under present method	866.50
		Increased yield on $20,000 income	$ 101.50

The explanation for the increase in the yield under this suggested method of calculation is, of course, the broader base on which the higher rates are applied. It will be noticed that the taxpayers in the lower brackets receive the same amount of consideration under both arrangements. The arguments for the latter method are first, the increased yield at the same nominal rate, and second, the consistency of taxing the entire net income. At the present time this method of calculating income taxes is employed by the states of Arizona, Iowa, Minnesota, South Dakota, and Wisconsin.

For the purpose of estimating what would have been the difference in Mississippi's revenue, had this method been in operation, I have calculated the probable yield in the State for the period of January 1, 1939-September 30, 1939, based on the actual receipts for that period.

Class of Taxpayers	Estimated Revenue under Proposed Method	Revenue Under Present Method	Estimated Net Increase
Married Persons	$ 653,139	$ 514,721	$138,418
Single Persons	123,119	114,495	8,624
Heads of Families	15,966	13,703	2,263
Estates	9,322	9,054	268
Corporations	616,079	613,790	2,289
Total	$1,417,625	$1,265,763	$151,862

The tax under the above method of calculation would, of course, be correspondingly larger under a system in which the deductions for taxpayers and dependents were reduced.

c. Another change that could be made in the manner of computing the income tax that would result in a higher revenue yield without a change either in the rate or in the deductions for the lowest income group, but a change that would better conform to principles of sound economics than the one just illustrated would be to apply the principle known as vanishing exemptions. By that is meant to reduce the exemptions, or allowable deductions as the size of the income increases until the exemptions or deductions completely vanish. To illustrate, assume a married person with two dependents. The deduction from total net income to secure the taxable net income would be $2,500 plus $800, or $3,300. The calculations would be as follows:

Net Incomes	Less Deductions Decreasing at Same Rate that Income Increases	Taxable Incomes
$3,300	$3,300	$ 0
3,500	3,100	400
4,000	2,600	1,400
4,500	2,100	2,400
5,000	1,600	3,400
5,500	1,100	4,400
6,000	600	5,400
6,500	100	6,400
6,600	0	6,600
7,000	0	7,000

It will be easily seen that if the deductions are required to decrease at the same rate that income increases, that when the income amounts to twice the deductions, or exemptions, the exemptions will completely vanish and place the $6,600 income on a comparable basis with the $3,300 income. Not only should such a method produce substantial increases in revenue, but as between the two proposals for change in the method of calculation, it is undoubtedly the soundest of the two.

The proposal outlined under "b" introduces consistency, in that it taxes all net income instead of only a part. But it has the disadvantage of further sanctioning the granting of tax exemption in principle. It is true, that the difference between allowing deductions from income and the granting of exemptions from taxes is

a technical difference. But the difference is important nevertheless. Tax exemption is bad in principle, because once it becomes intrenched in a system, it continues to spread until the whole system is demoralized. It is very important that exemptions be kept at the lowest possible minimum. One of the worst things about the revenue system in Mississippi today is the headway made by the practice of granting to selected groups exemption from their proper share of the public expense.

The proposition that I outlined under proposal "c" does not grant any exemption in principle, but does recognize the sound public policy of allowing for living expenses among people of small incomes. As a matter of common sense, this allowance becomes unnecessary when incomes become large. It is just as illogical to maintain that a person who, having only a $1,000 income per year, is granted exemption from the income tax should continue to receive that consideration when his income becomes $50,000, as it is that a person on relief drawing $15 a month is entitled to continue to collect his $15 a month when he receives a salary of $250 a month. Both propositions rest on the same basis—if one is good, the other is good; if one is bad, the other is bad. I have not attempted to estimate the probable increase in revenue under this last proposition. But assuming the rates and deductions under the existing law, it would undoubtedly be much larger than the yield under the present tax, and would of course, be larger or smaller as the deductions or rates were changed.

The Income Tax on Corporations. In principle, corporations do not occupy the same position as individuals with respect to exemptions, or deductions from net income for necessities of life. There is nothing about corporations upon which can logically be based the same claim. The basis for one is human need; the basis for the other is business profits. When a corporation is organized for profit, it not only places an added burden on government but begins immediately to receive the various benefits of government, such as the use of its courts, its police system, and all the things necessary to maintaining for it a society and environment suitable for the activities in which it expects to engage. In other words the cost of government is the first cost of doing business whether the concern operates at a profit or at a loss, and should receive first consideration in the priority of payment.

Notwithstanding the sound principle that the cost of government should stand at the head of the list of business expenses, and

that net income should not be considered to have been earned until after those costs have all been paid, nevertheless, partly for the purpose of encouraging the development of industry and partly because of the confusion of the nature of corporations with that of persons, there has developed a widespread practice of permitting government to occupy a residual position in the list of creditors. The result is that many persons feel that corporations, just as persons, should be taxed only on their net incomes. While in principle, such a practice is open to challenge, it is not an adequate defense of the practice in a few states of leaving part of the net income untaxed.

As a matter of fact there is growing support for the idea that, while under ordinary conditions, the corporation tax may rest upon net income, not only should it rest upon the entire net income, but that because of the obligation of business to the State, it should, at all times assume part of the cost of government. The proposition is widely accepted that when the net income falls below a certain point in relationship to the gross income, the tax may automatically fall on the gross income, though at a somewhat lower rate. To tax corporations under normal conditions on the basis of net income is less burdensome on business in general. But because it is necessary for government to continue to operate, even when business is not operating at a profit, it is a recognized fact that some basis other than net income must be used, and the one most generally recognized is gross income. The proposition of allowing for both a continuous flow of revenue, yet at the same time be governed primarily by the profitableness of business amounts to the providing of two taxes, one on gross earnings at a moderate rate, the other at a higher rate on net earnings, with the proviso that in each particular case the tax collected shall be the higher of the two. To illustrate, the gross earnings tax might be 1/5 of the tax on net earnings, the same relationship being maintained throughout the schedule of net income brackets, and that when the tax of, say 10 per cent on net income, produces less than the tax of 2 per cent of the tax on gross income the latter amount is the amount to be collected.

Or, since the relationship of net to gross income varies so greatly between different businesses, a single tax rate could be worked out that would take into account both the gross and the net incomes at the same time, the rate being based on gross income and graduated as the ratio of net to gross increases. For example:

When Net Earnings Are	Tax on Gross
5% of gross or less	1.0%
over 5% to 10% of gross	1.5%
over 10% to 15% of gross	2.0%
over 15% to 20% of gross	2.5%
oevr 20% to 25% of gross	3.0%
over 25% to 30% of gross	3.5%
over 30% to 35% of gross	4.0%
over 35% to 40% of gross	4.5%
over 40% to 45% of gross	5.0%
over 45% to 50% of gross	5.5%
over 50% of gross	6.0%

The above schedule of tax rates falls on both the gross and the net income. Nominally it is on the gross income, and consequently when a corporation produces no net income at all or any net income less than 5% of its gross, it will pay at least 1 per cent on its entire gross income. Nevertheless, when the business becomes more profitable and the net income bears a larger proportion to the gross, the rate on the gross becomes large to take into account the increased profits of the business. Under the present law, corporations that do not have a net income in excess of the allowable deductions of $1,000 are not required to make any returns at all. But under the arrangement above outlined, since every active corporation presumably enjoys at least some gross income, the state would be insured of a report and an income tax from every active corporation in the state.

Any consideration of the net income tax on corporations should include a review of the practice of deducting debts, and particularly long-term debts, from the gross to obtain the net. In this connection, I am thinking primarily of the practice of many corporations that are set up with a nominal amount of capital stock but which do most of their financing through bonds. In many cases, the stock and the mortgage bonds are owned by the same persons, or holding companies. Since interest on bonds are deducted from gross earnings to produce the net, a large part of the business earnings are paid out before any net income shows on the books, and the tax base is to that extent impaired. There are important concerns in Mississippi that operate as subsidiaries to foreign corporations but that are so financed as to enable them to export enough of their profits to their holding companies that there is frequently not as much income left as the $1,000 allowable exemptions.

The often raised distinction between mortgage bonds as a debt and capital stock as owners' equity is very questionable, especially from the standpoint of taxation. Every person familiar with the nature of corporate organization knows that not only do the corporate assets consist of both the stockholders' and bondholders' equities, but that the bondholders have a prior claim on all assets. They also know that from the corporation angle, that stock represents a debt of the corporation just as truly as do mortgage bonds. Consequently, to tax one as an asset and deduct the other as a liability, or to tax the earnings on one as income and deduct those on the other as expense is to change lines of reasoning, depending upon which angle of investment is to be emphasized.

The confusion between the relationships of capital stock and mortgage bonds, especially in connection with taxation, grows out of a failure to distinguish between individual and corporate property, or income. In the case of individuals, to tax the property and the amount of the mortgage debt is theoretically unsound, because the individual's true taxable property consists in his surplus above indebtedness. But in the case of corporations, where the assets are represented by bonds as well as stocks, Professor E. R. A. Seligman, one of America's greatest tax scholars, pointed out years ago that "only by taxing both capital stock and mortgage debt can the state reach the true faculty of the corporation".[3] Undoubtedly one of the large leaks in Mississippi's revenue system is due to a failure to realize and give effect to the fact that both stockholders and bondholders are asset owners of corporations, and that both are also income receivers, and that, in that respect, they both stand on the same plane.

Any revision in corporation taxes in Mississippi should take into account the fact that the State levies a franchise tax on corporations as well as an income tax. The administration of both of these taxes requires not only an auditing of returns from both kinds of taxes from every corporation, except those that do not pay an income tax, but also two problems of allocation for those corporations that do business both in Mississippi and in other states. Frequently corporations resort to various devices through which they can assign to other states, with low taxes, income actually earned in this state. The running down of cases to see that foreign corporations have allocated the proper proportion of their incomes or of their franchise taxes to Mississippi, or that the declarations

[3]SELIGMAN, ESSAYS IN TAXATION (10th ed. 1931) 106.

contained in both franchise and income tax returns, on both domestic and foreign corporations, are in accord with statutory requirements, undoubtedly result in less effective administration than if there were a smaller number of cases to handle.

It therefore appears that if the corporate franchise tax and the corporate income tax were rearranged so that the revenue features of the franchise tax could be incorporated into the income tax, and the franchise tax be retained essentially as a registration, or qualifying tax, many of the present duplications and complexities would be eliminated. The result should not only produce greater simplicity in administration but add to the State's revenue through more effective administration. Such an end could be achieved by assessing to every corporation in the State, domestic or foreign, a flat franchise tax in a nominal sum, probably $10 or $15 per annum for the corporate privilege of doing business in the State. There would then be no problem of checking the accuracy of returns or of allocation with the respect to the franchise tax. The revenue phase of the franchise tax could be incorporated into the income tax by making the income tax rate large enough to produce the revenue formerly derived from both taxes. The only returns, or allocations that there would then be necessary to audit would be those of the income tax. Not only would there be no sacrifice of revenue but the combined purposes of both taxes would be more efficiently achieved.

The Taxes on Alcoholic Beverages and Tobaccos

The tax on beer and wine in Mississippi for the fiscal year 1938-1939 returned a revenue of $631,871.14. Any complete discussion of taxes on alcoholic beverages and tobaccos involves problems of public policy regarding regulation and control. Frequently that angle is considered more important than the purely fiscal aspect—in fact sometimes so much more important that an entirely economic consideration is completely precluded. I am, therefore, not going to consider the problem of the rate or manner of taxing beer or wine, nor tobacco. But I do think that some recognition should be made of the probable yield on liquor should the state decide to legalize its sale.

For the purpose of estimating the returns from the sale of all alcoholic beverages, I have assumed the experience of Arkansas since Tennessee started selling liquor, which was July 5, 1939. Arkansas is a state of about the same number and character of

population as Mississippi. There is also about the same extent of concentration into cities and towns. So on those bases they are in a fairly comparable position. Furthermore, since Arkansas lost its Tennessee trade, and Mississippi would not have any Tennessee trade either, they are comparable in that respect also. Since the beginning of the operation of Tennessee's liquor law, the tax receipts from the sale of beer, wine and liquor in Arkansas have been as follows:

July	$160,486.15
August	88,180.70
September	119,906.82
October	185,021.55
Total	$553,595.22

If it is fair to assume that those four months represent approximately ⅓ of a normal year's business, Arkansas' revenue under the present circumstances should return approximately $1,600,000 per annum. Likewise, if we were to assume the operation of a liquor law in Mississippi, and a tax the same as that in Arkansas, we might expect a $1,600,000 revenue from that source also. To estimate the net increase, it would of course be necessary to subtract the State's receipts from the sale of beer and wine. Those figures for the fiscal year 1938-1939 were $631,871.14. I have not checked to see how the Mississippi beer and wine tax compares with the Arkansas tax, but if they are comparable, it would mean that Mississippi should draw around $1,000,000 from a liquor tax.

Without considering other problems of public policy in connection with the sale of liquor, there are certain economic angles that should be taken into account, and possibly even be controlling. First, there is now a large amount of the illegal sale of liquor within the State that undoubtedly does create a public burden and that does not pay its proper share of the public expenses. The second angle concerns the use or purpose to which an additional revenue thus derived would be directed. To permit the sale of liquor in order to obtain a tax for the purpose of further exempting groups of competent taxpayers from their share of the public expense would probably be demoralizing from two angles, that of the social effects of liquor, and the further demoralization of the State's fiscal and economic system. On the other hand if the proceeds were directed to the ends of common welfare through such

channels as common school education, the reduction of crime and disease, and other similar needs, it may be that the total advantages achieved would be more than enough to offset the resulting evils.

The Privilege Tax

There is probably no tax system in the United States that shows less evidence of careful planning than Mississippi's privilege tax. I am not going into a lengthy discussion of the development nor the causes for its present condition. That it is highly arbitrary, illogical, and does not bear the earmarks of consistency, much less even any accidental relationship to differences in either ability-to-pay nor benefits received, is understood by everyone who has given it thought.

Most of Mississippi's privilege taxes are graduated according to the population of the municipality within which the business is conducted. For example, for automobile dealers in towns of less than 3,000 population, the tax is $37.50; in towns of 3,000 to 5,000, $50; in towns of 5,000 to 15,000, $75; in towns of 15,000 to 25,000, $150; and in towns of 25,000 or more, $200. It is well known that there is no necessary relationship between either the profits or the size of a business and the population of the town in which it is located. Many of the best and most profitable businesses in the State are located in small towns, while every large town also has its share of business failures. Another way to illustrate the arbitrary and illogical operation of this system would be to suppose the location of two automobile dealers—one on each side of a street which serves as the corporate limits of a town of 25,000 or more population. The dealer on the side of the street that is in the town will pay $200 per year, while the one on the opposite side of the street will pay $37.50, yet, be in just as advantageous a location as his competitor. It is, therefore, very evident that the population of the community in which a business is conducted, or the fact that it operates in an incorporated town, cannot provide any index as to the taxable capacity of the business.

The majority of Mississippi's privilege taxes are just about as arbitrary and inconsistent as the one on automobile dealers. Sometimes the sheer number of privilege taxes that a business concern has to pay makes it impossible either to compare the burdens of the different kinds of businesses, or to know when they have been assessed their proper share of the tax. The operator of a small

gasoline service station told me just recently that he had to pay seven different state taxes on his business, not including his *ad valorem* tax, nor the sales tax, nor any of the federal taxes. Such a multiplicity of taxes undoubtedly becomes both annoying and complicated, and makes the total tax burden appear much heavier than it really is.

I have examined the business license tax systems in every state in the nation that has such a system, and have tabulated the different bases on which such taxes are imposed. The result shows that there are at least 13 important elements or characteristics on which such taxes rest. Among the most important of these are the kind of occupation itself, the population of the town in which the business is located, the kind or size of product produced or sold, the producing capacity of factories, the number of employees, the actual volume of output, the amount of invested capital, and others. There is also an almost unascertainable number of ways in which from 2 to 5 of these elements are combined to give even more complicated tax bases. Yet, in no place have I found a solution or formula on which all businesses may be reduced to a comparable basis for tax purposes. If it were possible to get at the relationship of net profits to the amount of invested capital, and to graduate the tax rate as the ratio of profits to investments increase, that would probably be about as fair as any base that could be found—or probably an even better plan would be to apply the formula proposed above for corporations. But most small businesses have such inadequate accounting systems that any formula that involved net profits would enjoy a very limited application. It is probable that the formula used by the State of New Mexico could have about as general an application as any, and would also give reasonable recognition to differences in the varying kinds of operations of different concerns. This formula is stated in terms of annual sales, but in effect is based on a combination of turnover and inventory values, as follows:

Annual Sales	Tax
Less than $3,000	$ 5.00
Over $3,000 but not more than $10,000	10.00
Over $10,000 but not more than $20,000	20.00
Over $20,000 but not more than $50,000	50.00
Over $50,000 but not more than $75,000	75.00
Over $75,000 but not more than $100,000	100.00
Over $100,00	150.00

Although the above schedule does not take net profits into account, it does have the advantage of being logical and more consistent than the more arbitrary types of privilege taxes, and it may also be adapted, by a variation in the rates, to take into account the differences between different kinds of businesses or occupations. There is no way to know what the revenue possibilities in the privilege tax are, but undoubtedly a study of the problem is needed both in the interest of clarification as well as for revenue.

The Ad Valorem Tax

Any careful study of the present status of taxation in Mississippi soon reveals that, with the possible exception of the gasoline tax and the income tax, most of the State's financing within recent years has been of an emergency character, or of a resort of expedients. Even the sales tax, the largest single source of state revenue today, was originally enacted as an emergency measure. The privilege tax, to a large extent, consists of a group of tax measures, accumulated from time to time largely from emergency situations extending back to territorial days. Some of the State's taxes are merely special adaptations of regulative measures to revenue requirements, as the beverage tax and the tobacco tax, for example. Then there is the general run of nuisance taxes, such as are found in practically every state in the nation.

The result is that today, Mississippi is relying largely on taxes that are essentially police power, or emergency in their origin and character, but which, because of a continuing demand for funds, the State has felt it necessary to retain as a part of its permanent fiscal system. As the budget of the State increases and the productivity of the property tax continues to decline, it becomes necessary to press each of these supplementary taxes to its maximum possibilities. Just what their exact limitations are, on one knows. That is a thing that has to be sensed, rather than ascertained by exact mathematical or statistical measurement. After a time, when a certain kind of taxed business or property begins to move away, or to otherwise disappear, it may be finally realized that the burden has actually been too heavy. As to which of Mississippi's taxes are heavy enough to cause a shrinkage in the base, I cannot say. I have indicated above my impression with the respect to a number of the State's taxes, the sales tax in particular. Many responsible people in the State feel that probably the limit is not far away with the respect to other taxes.

It is probable that if every suggestion contained in this report, excluding the liquor tax, could be put into effect, that the net increase in revenue may amount to between $2,000,000 and $2,500,000 per year—certainly not more than $3,000,000 under present economic conditions. But barring an increase in the *ad valorem* tax millage it is going to be very difficult for the State to increase its annual budget more than $2,000,000 to $3,000,000 in access of its present figure unless some fundamental revisions are made in the State's fiscal system.

There is probably no phase of the State's tax system about which less is known than the property tax. Just what this tax has to offer to either the state or local governments, it is impossible to say without more complete knowledge of the actual conditions. There has been a common saying for years that property was "taxed to death",—and that "something should be done for the relief of property". Yet everyone who has given the matter any careful thought knows that there is not enough known about the property tax to say what the property tax burden really is. There is no doubt but that much property is considerably overtaxed, sometimes even to the point of confiscation. But, at the same time, large amounts of property either are not taxed at all or are not paying on their proportionate values.

A tax specialist told me just recently that he drove into a Mississippi town of about 3,500 population and within less than 48 hours found 11 pieces of valuable property that were not even listed on the tax rolls. To what extent that condition exists over the State, I do not know. But among the properties for which homestead exemptions were applied for the last assessment year, there were found several thousand which failed to show on the land rolls any assessment whatsoever for dwellings on the land. From general knowledge and experience, I am certain that if all properties, not including those legally exempt, were entered on the rolls, the result would be amazing. In this connection it is in point to cite a disclosure that was made a few years ago in the State of Connecticut, where the taxing authorities resorted to the use of aerial photography to assist in the location and equalization of property values. In one Connecticut manufacturing town of about 16,000 population, a photographic examination revealed 1,896 buildings, lots and improved parcels of land that had never before appeared on the tax rolls. Of 3,251 dwellings in actual existence in that town, 223 had escaped taxation entirely. Of 2,902 barns, sheds, and private ga-

rages that the aerial photograph showed, 1,351 had never paid taxes. Of 281 stores, shops and public garages that the photographs revealed, 170, almost two-thirds of the entire number were not on the tax rolls. In another jurisdiction in Connecticut there was found an increase of 1,432 acres, or 4 per cent of its previous assessment; another showed a 7 per cent net increase in acreage with a net reduction of 2.5 per cent in the number of urban lots assessed.[4]

It may be that the situation as found in Connecticut is much worse than that in Mississippi. Yet, I do not know why the people of Mississippi should feel that they have a better assessing system than Connecticut. No doubt the people in Connecticut were surprised to find conditions that were revealed when the survey of the tax situation was made in that state. Since there have been no similar studies in Mississippi, it would, of course, be impossible to estimate what the local situation is. But that the State is gradually losing its *ad valorem* tax base is definitely indicated by trends that should cause reflection. For example, the total assessed values of all rural lands and improvements in Mississippi actually decreased $5,800,000 during the two year period of 1936 to 1938. During the same two year period, there was an increase in the value of urban lands of only $1,800,000. Business leaders of Jackson say that there was a greater increase than that amount in Jackson alone, much less in the entire state. Despite the fact that Mississippi is experiencing the greatest economic and industrial development in the history of the State, the value of all of its realty and improvements, both urban and rural, from 1936 to 1938 registered a net decline in assessed values of $3,800,000. In other words, if the only index of change in economic conditions in Mississippi were its assessed property values, the State would certainly be considered in a condition of decay—a condition which nobody would admit to accord with reality.

During the past nine months I have had opportunity to direct surveys of property taxation in two Mississippi counties, Lafayette and Covington, a brief statement of the results of which may be in point here. They further substantiate the inadequacy of the State's present system of property tax administration. Space is not

[4] *Tax Cameras Have Eagle Eyes* 60 WORLD'S WORK (September 1931) p. 60.

sufficient for particulars, so I am going to confine myself to brief summaries. The results of the studies for Lafayette County are shown in Table I[5] and those for Covington County in Table II.[6]

TABLE I.
RATIO OF ASSESSED TO SALE VALUE OF 305 PROPERTIES IN LAFAYETTE COUNTY

Sale Value of Property	Number of Properties	Total Sale Value	Total Assessed Value	Per cent of Assessed to Sale Value
Under $500	110	$ 27,482	$ 28,753	104.0%
$500 and under $1,000	66	44,452	24,038	54.3%
$1,000 and under $2,000	69	90,946	39,353	43.3%
$2,000 and under $3,000	27	65,850	23,695	36.0%
$3,000 and under $5,000	22	80,744	26,995	33.4%
$5,000 and over	11	82,950	23,605	28.4%
Total	305	$392,424	$165,439	42.2%

TABLE II.
RATIO OF ASSESSED TO SALE VALUE OF 492 PROPERTIES IN COVINGTON COUNTY

Sale Value of Property	Number of Properties	Total Sale Value	Total Assessed Value	Per cent of Assessed to Sale Value
Under $250	171	$ 22,532	$ 33,296	147.8%
$251—500	128	49,918	38,235	76.6%
$501—750	47	28,997	18,640	64.3%
$751—1,000	36	33,322	19,280	57.8%
$1,001—1,500	33	42,463	22,260	52.4%
$1,501—2,000	28	51,298	19,725	38.4%
$2,001—3,000	26	68,805	32,045	46.6%
$3,001—4,000	6	21,311	8,035	37.7%
$4,001—5,000	8	35,810	16,920	47.2%
$5,001—10,000	6	41,500	15,860	38.2%
Over 10,000	3	34,000	7,450	21.9%
Totals	492	$429,956	$231,746	53.9%

Each of these surveys shows that low value properties are consistently assessed proportionately higher than high value properties. In Lafayette County the owners of property worth $500 or less, paid on an average, on 104 per cent of the value of their property while the owners of properties worth $5,000 and over paid on only 28.4 per cent of the value of their property. The total value of properties of $500 and less was $27,482, yet the owners

[5]W. T. York, *The Assessment of the Property Tax in Lafayette County, Mississippi* (M. A. thesis, University of Mississippi, 1939).
[6]H. J. Craft, (M. A. thesis in progress, University of Mississippi).

paid on $28,753 assessments. The total value of properties of $5,000 value and over, amounts to $82,000, or almost three times that of the lowest class, yet paid on only $23,605.

In Covington County the situation is essentially the same. The lowest value properties are taxed on 147.8 per cent of their actual values, though the highest value properties pay on only 21.9 per cent of their actual values. In other words, in Covington County, $22,532 worth of property pays on $33,296 while $34,000 pay on only $7,450. In neither of these counties have the examinations proceeded far enough to show the amount of properties that are not taxed at all, nor whether there are such non-taxed properties. But where there are such gross discrepencies in valuations, it would not be surprising if many properties were entirely overlooked.

The conditions which I have indicated with respect to Lafayette and Covington Counties are not peculiar to those counties and there is no inference that conditions in them are particularly different from those in other counties. They undoubtedly reflect a condition that is largely statewide. They also, together with the above cited decline in assessed valuation through out the state, serve as an indictment of our whole system of property tax administration. Just where the seat of the trouble is, or where the solution lies, I am not going to undertake to answer here. As a matter of fact it would be premature to suggest an answer to the problem until information can be obtained for the state as a whole. Furthermore, no remedial measures, with respect to property taxation are likely to be taken by the people until they are convinced that they have a problem, and in just what manner they are sufferers in their own local communities. I do not believe that any progress will ever be made toward the placing of property tax administration upon a sound basis until the whole system is thoroughly examined and the gross discrepancies publicized. In other words, the decay of property tax administration is analogous to a disease that requires complete diagnosis before either the proper kind of remedy can be prescribed or the patient be convinced that he is sick enough to need any treatment at all. But undoubtedly, any fundamental adjustments in Mississippi's fiscal system must include a complete reexamination of the entire property tax system.

Homestead Tax Exemption

The operation of homestead tax exemption in Mississippi was discussed at considerable length in an article of mine in the De-

[7]Arant, *Homestead Tax Exemption in Mississippi* (1938) 11 Miss. L. J. 167.

cember, 1938 issue of the *Mississippi Law Journal*,[7] and I do not expect to devote much space to that problem here. There are, however, two angles of the problem that should be brought out in this connection. One of those angles relates to the matter of immediate revenue; the other relates to the general problem of property tax administration.

The present cost of homestead tax exemption in Mississippi is about $2,750,000 per annum. This cost is financed by a specific appropriation from the general fund, just as in the case of other appropriations.

It appears logical that homestead tax exemption should be weighed, or evaluated along with other fundamental needs within the State, such as the reduction of illiteracy,[8] and improvement of public health, the reduction of poverty and disease,[9] and a number of other things that are fundamental to common social decency. These are some of the things without which Mississippi will never develop the best qualities of its people, nor improve their social and economic status. In the claim of property owners for subsidy at the hands of the public purse, there are many other considerations that should be weighed, and each demand should be required to take its proper place in the order of priority, not in the scale of class interest, but of common interest. If the State feels that the common interest can be best served by requiring that the public-at-large should be taxed to pay the taxes of a selected group of property owners, then homestead tax exemption has a prior claim on the public treasury. On the other hand, if the State feels that the public-at-large should be the first beneficiaries of taxes collected from the general public, then homestead exemption should be given a residual claim on the general fund.

If homestead exemption retains its prior claim, the logical course would be to continue the present policy of making specific appropriations for that purpose, and of allowing other things to come later. On the other hand, if it is felt that there are other public welfare measures that are more pressing, and more vital to the economy of the State, the logical course would be to appropriate for those things such an amount as may be necessary, if sufficient

[8]According to the Bureau of Census Report, there are only three states in the nation, a greater percentage of whose population cannot read and write than that of Mississippi.

[9]For example, "Mississippi has the highest infection rate for syphilis of any state in the United States. At least 300,000 cases of this disease exist in the State, and 28,000 new cases were reported by the physicians of Mississippi last year." Mississippi Social Hygiene Association, Jackson, Miss.

funds can be made available, and then to apply on a *pro rata* basis, the residue of the general fund for homestead exemption. The maximum amount that a change of this character would make available for the State would be the full value of the present cost of homestead exemption. To make such a change would, of course, create considerable opposition, and would challenge the very highest order of statesmanship that Mississippi has to offer, for it is a historical fact, almost without exception, that once a class becomes the special beneficiaries of the common purse, it is extremely difficult to get them to release their hold.

Barring that possibility, homestead exemption probably does provide the occasion for a reform that may be sufficient to offset the burden that it places on the state's economy. That reform has to do with the problem of property tax administration. If the State is going to be required to pay the cost of exempting property from its local tax bills, and the amount of the payment depends on the assessed values of that property, it would logically appear that the State has not only a right, but a duty to see that the assessed valuations are properly placed. In other words, along with the payment of a large part of the bills of local government through homestead tax exemption, both a right and a duty devolves upon the State to direct and supervise the assessing of property, and probably even the disbursement of local funds. Briefly, homestead exemption appears to raise a fundamental issue of local government—that of continuing to function independently in matters of taxation and expenditures, or of having them both brought within the purview of the State authority. It is difficult to see how they can accept State finance without also submitting their finances to State supervision.

Public Finance and Industry

A problem of growing importance in public finance is its relationship to industry. In promoting the interest of the common welfare, one of the chief functions of the state is to assist in increasing the efficiency of the productive side of its economic system. Among the primary ways in which this efficiency is aided is in the maintenance of good government, particularly the enforcement of law and order and of contractual rights and obligations. Among the many other attempts of government to promote productive efficiency may be listed such aids as public-supported schools for education in industrial, agricultural, commercial, and

other technical subjects; the supply of information and assistance in the marketing of goods; the regulation of unfair competition; the assistance in the location and exploitation of natural resources; the development of an adequate transportation system; the granting of special exemptions and subsidies; and many other ways. But as to whatever method government employs to promote the efficiency of its economic system, it is purely a matter of public policy. In the selection of such a policy, however, there are frequently involved problems of important social and economic significance that should be carefully analyzed and weighed. Often the results may be the overemphasis of one kind of production to the neglect of others more important, or the benefit of a few at the expense of many, or a superficial immediate advantage at the expense of a less obvious economic impoverishment.

From the beginning of our national existence, over one hundred and fifty years ago, the government of the United States has followed a policy of subsidizing industry through high protective tariffs. The result, which has been common knowledge to every Southerner since the Ordinance of Nullification by South Carolina in 1832, has been a siphoning of wealth and income from the agricultural South and West to the treasuries of the industrial North and East, a process that has continued until the present day. The pressure became so great by 1861, that the South could stand it no longer and seceded from the Union to set up its own government. In the war that followed, the South lost, and was forced back into the same system from which it had fled. She had no choice but to submit to exploitation by northern interests. The impoverishment of the South continued as its resources and the wages of its labor were taken away to the treasuries of the northern financial centers.

Today, the South is encouraging an accentuation in this export of her income to northern capitalists through a misguided effort on the part of her leadership to increase southern production by subsidizing northern financiers through tax exemption to locate industrial plants in southern states. It is an irony of history that southern leaders should sponsor the intensification of an exploitation that the South has fought throughout its history, and use the same arguments that have been used to defend tariff protection for a century and a half—the employment of labor and aid to infant industries. But strange as it may seem, these industries have never grown up enough to do without public subsidy, and unemployment is greater than ever before.

Taxation is a prime cost of operation, and every industry that cannot pay its cost of doing business occupies a questionable place in the community. They increase the expenses of government through increased court cost, police protection, labor problems, *et cetera*, and since subsidized industries suspend operation when profits fail, just as self-supporting industries do, they add to the length of the community's bread lines during unemployment periods. In the meantime, not only the tax base is being narrowed, but the tax bills of those concerns are being paid by the common people of the community—even by the very employees of the industry.

As a mater of fact, tax exemption is such a small factor in the location of industries, that it is very doubtful if any but the marginal concerns locate in a community on that account. And where such is the case, the burden of proof should be on the industry to show that it does not take away from the community more than it brings in.

As a rule, the more desirable classes of industries frown on that type of industrial bribery, for in their cases, it is not a matter of covering expenses, but of maximizing profits. They regard tax exemption as cheap bargaining. The more desirable type of industries move or locate because of more attractive reasons. A survey by the Civic Development Committee of the National Electric Light Association ranks the factors that account for the location of industries in the following order:

1. Markets
2. Labor
3. Transportation
4. Materials
5. Available factory buildings
6. Personal reasons
7. Power—fuel
8. Cheap rent
9. Near related industries
10. Living conditions
11. FINANCIAL AID
12. TAXES
13. Mergers
14. Cheap land
15. Near parent company
16. Banking facilities

From the above list it may be noticed that *financial aid* and *taxes* rank 11th and 12th out of the list of 16 factors. Consequently they cannot be very important. Probably the State of Mississippi, in its bid for industry, would do well to reconsider the whole matter of industrial subsidies, and re-approach the problem from such angles as its market possibilites, quality of labor rather than cheapness of labor, transportation facilities, the raw material possibilities, particularly its minerals, its clays, new agricultural products,

the markets and price for which are more dependable than that for cotton, its power and fuel facilities, and other favorable factors that have real substance to them, and of which it has plenty—and then hang out a sign that *industry is welcome on condition that it can pay its own bills.* In that way the State will not only enhance its own dignity and self-respect, but elevate itself in the estimation of others. No state can subsidize its way to prosperity. Real prosperity can be attained only by an intelligent application of hard work to its own basic resources, and in the development of its own basic industries—and through a prevention of the exploitation of its own citizens, see that the income therefrom is retained for spending by the hands of those who produce it. Without such a program, no long-run answer will ever be found to either the problem of adequate public revenue, nor to the problem of raising its people from the level of hewers of wood and drawers of water for others to a plane of decent living and independent self-determination.

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NOTE: The names and addresses of all other officers and members of the MISSISSIPPI STATE BAR ASSOCIATION are contained in the August 1939 issue of the JOURNAL.

THE AMERICAN BAR ASSOCIATION—PROGRESSIVE OR REACTIONARY?

*Walter P. Armstrong**

In recent years there has been sporadic criticism of the American Bar Association as "a reactionary group."

An examination of the official record discloses, however, that in dealing with measures designed to promote the speedy and certain admistration of justice, the Association has uniformly fought on the side of the reformers.

It advocated a Federal Declaratory Judgment Act for many years before one was enacted. This was true despite the fact that grave doubts were expressed as to the constitutionality of such a measure.

The new Federal Rules of Civil Procedure are probably the most significant law reform of our time. The statute which enabled the Supreme Court to promulgate them became effective June 19, 1934. Its enactment resulted largely from the efforts of Homer Cummings, then Attorney-General, to whom sufficient credit for this and other law reform has not been given. The American Bar Association began to move toward this objective in 1910. In their formulation it assisted in every way possible.

As a supplement to the Federal Rules of Civil Procedure the Association has strongly advocated an act authorizing the Supreme Court to promulgate rules of pleading, practice and procedure for criminal cases prior to verdict or plea of guilty.

Recently when President Roosevelt signed the act providing for an administrative officer for the federal courts he commended not only the measure he was signing, but the act providing for the voluntary retirement of Justices of the Supreme Court, and the act permitting the Attorney-General to intervene in cases between private litigants where constitutional questions are presented. Each of these measures had been approved by the American Bar Association before it was enacted by the Congress.

However, to determine the Association's official position it is not necessary to search the record prior to the recent annual meeting in San Francisco. At that meeting the Committee on Jurisprudence and Law Reform made nine recommendations which President Frank J. Hogan in a letter to the members characterized as of "far reaching importance". All of these proposals received the approval of the Association.

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*Chairman of Committee on Jurisprudence and Law Reform of the American Bar Association.

Aside from the Federal Rules of Civil Procedure, taken as a whole, they probably constitue as advanced a code dealing with courts and the administration of justice as had been proposed in this generation. Each of these reforms was suggested to the Congress by Mr. Cummings in his final report as Attorney-General.

The Association approved the establishment of a system of public defenders in the federal courts.

A system of public defenders for indigent defendants in criminal cases has been in successful operation for a number of years in the State of Connecticut on a state-wide basis, and in a number of the larger cities, notably, Los Angeles and Chicago. It has two important and significant results. First, it accords appropriate representation by counsel to impecunious prisoners. Second, it has tended to reduce technical and dilatory tactics on the part of defense counsel and to expedite a determination of cases on the merits. Competent observers in Chicago especially emphasize this result of the introduction of the public defender system in that city.

At present the federal courts still follow the traditional custom of assigning members of the bar to defend indigent prisoners. Attorneys so designated serve without any compensation. This is fair neither to the members of the bar who are asked to carry the burden, nor to the defendants who at times are inadequately represented.

The Conference of Senior United States Circuit Judges in 1937 approved "in principle the appointment of a Public Defender where the amount of criminal business of a district court justifies the appointment."

Some of the more conservative lawyers have disapproved this innovation on the ground that it made for "the socialization of the Bar." The Association has rejected this view and approved the Committee's recommendation for the establishment of a system of public defenders in the federal courts.

A measure which the Association approved requiring registration of all pistols and revolvers and of the transfers of such firearms would place a potent weapon against crime in the hands of law enforcement officers.

The desirability of this legislation is evinced by the fact that it is urgently advocated by such bodies as the International Association of Chiefs of Police. One of the big problems confronting officers charged with the duty of suppressing crime and apprehending criminals is the ease with which the latter procure deadly weapons of various kinds. It has been the observation of the Federal Bureau of Investigation of the Department of Justice that dangerous desperadoes whom its agents have had occasion to ap-

prehend are generally found to be supplied with arsenals of assorted firearms, which were obtained through illicit channels. To place traffic in firearms under scrutiny would be an important aid in the enforcement of the criminal law.

From the standpoint of the good citizen, this requirement would impose no greater hardship than the one which compels him to register his automobile and is one of those trivial burdens which he should willingly assume for the welfare of the society.

The Association approved in principle an act permitting the United States to be sued in tort actions in respect of claims for property damage or personal injuries due to the negligence of government officers and employees in the performance of their duties.

Under existing law, the United States is subject to suit on contract and for infringement of patents. It preserves its traditional immunity against suit in tort, except certain classes of admiralty and maritime torts.

There is no logical or practical reason for maintaining this immunity, which finds its basis solely in the old English maxim that the King can do no wrong. Thus, the explanation for the existing rule on the subject is a historical one and is not based on any principle of reason or justice.

While by existing statutes heads of government departments are endowed with authority to settle claims for property damage involving less than $1,000, even in such instances the injured party has no remedy by any judicial proceeding. The practice of passing private bills by the Congress to deal with individual claims still prevails. The result is that Congress at each session is flooded with hundreds of bills of this kind. This is a haphazard manner of dealing with claims against the Government and is unfair, both to the claimant and to the Government, in that Congress is lacking in suitable machinery to investigate claims of this kind.

Another proposal—permitting one accused of a crime against the United States to waive indictment by grand jury and to consent to prosecution by information—is in the interest of the impecunious defendant who is committed to jail because of inability to give bail. Most federal judicial districts are divided into a number of divisions, and outside of the large urban centers terms of court are generally held but twice, and sometimes once a year in each division. The result is that at times a defendant who is too poor to give bail is incarcerated in the local jail for a number of months before the grand jury convenes and indicts him, in spite of the fact that he may be perfectly willing to plead guilty and commence any sentence that may be imposed on him.

The Department of Justice states that it has frequently been importuned by defendants under such circumstances for an opportunity to plead guilty, but is unable to accord them any relief. While indictment by grand jury is a basic constitutional right, there is no reason why a defendant should not be permitted to waive it if he so desires, just as he is permitted to waive a trial by jury and to consent to be tried by the court.

Some years ago at the suggestion of one of the United States Circuit Judges such a bill passed the Senate, but failed of passage in the House. The desirability of such legislation is so obvious that it seems that only Congressional inertia can defeat it.

It is proposed to require defendants in criminal cases in the federal courts, who purpose relying upon the defense of alibi, to give to the prosecution notice of that fact before trial.

The purpose of this proposal is to make it impracticable for a defendant in a criminal case to take the prosecution by surprise by advancing the defense of alibi on the trial for the first time, when the government had had no opportunity to check the correctness of the contention and procure evidence in rebuttal, if the contention is found to be without justification. The defendant is, of course, not prejudiced by being required to give such notice in advance before trial. Similar statutes are in existence in several states, with desirable results.

The proposal sanctioned by the Association, that comment be permitted upon the defendant's failure to testify may seem revolutionary to some. In fact, it is not nearly so revolutionary as originally was the suggestion that defendants be permitted to testify and thus break the seal of silence with which the law has traditionally closed their lips.

The rule which precludes the prosecuting attorney from commenting on the failure of a defendant to take the witness stand in his own behalf is artificial and completely inconsistent with the realities of life. No necessity appears for it. It is no part of the privilege against self-incrimination, and to permit comment would not in any way impair the privilege, but might have a tendency to prevent possible miscarriages of justice. It is understood that in several states such comment is permitted without any unjust results to defendants.

The Committee believed and the Association agreed that the Criminal Appeals Act should be amended so as to permit the United States to appeal from any order sustaining a demurrer or like pleading.

Under existing law the government may appeal in a criminal case from any order sustaining a demurrer to an indictment, granting a motion in arrest of judgment, and the like, if the ruling adverse to the Government was based on the constitutionality or construction of a statute.

The purpose of legislation which is now pending is to permit the Government to appeal from any adverse ruling sustaining a demurrer to an indictment, granting a motion in arrest of judgment, and the like, without restriction to cases in which questions of constitutionality or statutory construction are involved.

In most states the prosecution now has such a right of appeal, and no reason is perceived why the prosecution should not have such a right in the federal courts, and thereby be enabled to prevent possible erroneous dismissals of criminal cases. Needless to say, this legislation does not encroach upon the double jeopardy provision, since no appeal would be permitted in cases in which a defendant has been acquitted after trial.

The American Bar Association has not endorsed the principle of the compulsory retirement of federal judges at a certain fixed age. It has, however, recognized the fact that in some instances they outserve their usefulness. Frequently this is the result of economic pressure. The result is pathetic so far as the individual is concerned and frequently detrimental to the administration of justice. A partial solution, at least, is to relieve the economic pressure. The Association has therefore approved in principle an act providing for a system of voluntary retirement for federal judges who have become disabled before reaching the present retirement age. Under existing law a federal judge may retire on full pay after having reached the age of seventy and having served ten years on the bench. No provision is made for a judge who becomes permanently disabled prior to reaching the retirement age or prior to completing ten years of service. Instances have occurred of judges being entirely or in large part disabled from performing any judicial services and yet staying on the bench for a number of years, until they reach eligibility to retirement under the existing law.

As a matter of fairness both to judges and litigants, it would seem that a plan should be provided for voluntary retirement of judges who become permanently disabled before becoming eligible for retirement on account of age. Since the San Francisco meeting such a measure was passed and signed by the President.

The Association approved in principle an act prohibiting federal judges from actively engaging in any other kind of business.

In dealing with this recommendation the report said:

> "That federal judges should not have any other vocation is not fairly debatable. Not only does it interfere or at least tend to interfere with the proper exercise of the

> judicial function but it detracts from the dignity of the office. So true is this that many lawyers find it difficult to realize that such cases exist. For this reason they are skeptical of the necessity of crystallizing in a statute the condemnation of such practices. Yet such cases do exist and so long as this is true they should be condemned by legislation."

This was written before the revelations in the Manton case. That case, however, demonstrated the correctness of the Committee's position. Indeed, as a result of its lesson the Committee is now considering whether it should recommend an act much broader in its scope.

The past record of the American Bar Association, supplemented by the adoption of these nine recommendations, seems to me fairly to illustrate its credo. It is not reactionary, nor is it radical. It is sanely liberal. I believe it represents the considered thought of a majority of the lawyers in the United States and in their authentic voice.

The Association not only approved these nine recommendations of the Committee on Jurisprudence and Law Reform, but also authorized the Committee to confer with local and state bar associations, solicit their support for them and to advocate them before appropriate Congressional Committees. As chairman of the committtee, I shall obey this mandate.

It may be a novel spectacle to see an organization pressing for legislation when there is no interest to be served but that of the public. It is my hope, however, that this will make the influence of the American Bar Association no less effective when it advocates these measures.

NOTES

Masters's Tort Liability To Servant In Mississippi

I.

Historical Background

The scope of this paper is limited to those cases decided by the Supreme Court of Mississippi dealing with the liability of the master to the servant, and which arose prior to the adoption of § 193 of the Constitution of 1890. In all these cases the defendant was a railroad corporation. This is attributed to the fact that the railroad was practically the only hazardous industrial enterprise carried on in this state.

The status of the law at this time was favorable to the master. In fact, it was practically impossible for the servant to recover irrespective of how free from blameworthiness his own conduct might have been.[1] Before going into the cases it might be well to state the general principles prevailing which practically exempted the railroad companies from any liability, namely: the two well known principles of the fellow-servant rule and the doctrine of assumption of risk.

The first case to arise, *New Orleans, J. & G. N. R. R. v. Hughes*,[2] is a typical example of the application of the fellow-servant rule by the Mississippi Court. This case involved an injury to an engineer caused by the unsafe condition of the track. The train was derailed and the plaintiff engineer injured. The evidence showed that it was the duty of the section boss and road master to keep the road bed and tracks in good repair. The court held that these persons were the fellow-servants of the injured engineer and denied recovery. It declared that those who were coworking in the same common enterprise, under the same master and compensated by him, were fellow-servants. Such a broad statement as this makes it practically impossible to hold any corporation liable for injuries sustained by a servant, because the entire business is carried on by so-called fellow-servants. The court does point out in this case, as well as in the later case of *Howd v. Miss. Cent. R. R.*,[3] that the master would be liable if he had known of the defects or if he had not used reasonable care in the selection of servants, or had continued these servants in employment after he knew, or should have known, of their unfitness.

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[1]For cases wherein the plaintiff was guilty of contributory negligence, see New Orleans, J. &. G. R. R. v. Harrison, 48 Miss. 112 (1873); Memphis & Charleston R. R. v. Thomas, 51 Miss. 637 (1875).

[2]49 Miss. 258 (1873).

[3]50 Miss. 178 (1874).

This limitation is likely to be of little value. In the first place, it is extremely difficult to fix on the company knowledge of incompetency of an employee at the time of employment. Furthermore, is it not open to the court to declare that the person making the employment on behalf of the company is likewise a fellow-servant? Furthermore, if the master is a corporation, might it not be reasoned that it can only know of defects through its servants? The Supreme Court of Mississippi refused to make any definite commitment regarding who are and who are not fellow-servants. It is indicated that perhaps certain undesignated higher officials might be deemed to bear such relation to the corporation as to be considered as the physical embodiment of the business itself.[4]

In the case of *Louisville, N. O. & T. R. R. v. Petty*[5] a brakeman was injured due to the negligence of the yard master who failed to fill the sand box on the train. The court said that "all employees of a railroad company engaged in the merely *operative* service connected with the carrying on of the business of running trains are fellow-servants, and that the common employer is not responsible to one of these for injuries caused by the negligence of another." Recovery was denied. In *Lagrone v. Mobile & Ohio R. R.*[6] the court held that the section master was the fellow-servant of one of the laborers whom he had employed. These cases indicate the extent to which the court went in defining fellow-servants.

The case of *Vicksburg & Meridian R. R. v. Wilkins*[7] affords a good illustration of the application of the doctrine of assumption of risk. In this case the plaintiff was injured because of a defective valve on an engine which the company had furnished. The evidence showed that the plaintiff knew of the dangerous condition and that it was possible for him to avoid the injury. The court held that if he continued to work in the face of this condition he would be held to have assumed the risk of the unsafe engine and therefore he was not entitled to recover.[8]

The fellow-servant rule might well be regarded as a corollary to the broader doctrine of assumption of risk. From this view point, it would be said that the risk of injury by a fellow employee is one of the usual and normal perils of employment which the servant assumes. An example of this is found in the case of

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[4]In New Orleans, J. & G. R. R. v. Hughes, 49 Miss. 258, 289 (1873), the court said, "There are doubtless instances of employees, . . . so separated from the other employees, so disconnected in duty, that such a one ought to be exempted out of it [the fellow-servant rule]. Nor, on the other hand, would we undertake to say, in advance, that there might not be officers clothed with such special authority, and filling such special relations to the company, as, that the corporation should be esteemed as present with them . . . ".

[5]67 Miss. 225, 7 So. 351 (1889).

[6]67 Miss. 592, 7 So. 432 (1890).

[7]47 Miss. 404 (1872).

[8]For another interesting case on the same point see Henry v. Bond, 34 Fed. 101 (S. D. Miss. 1888).

Chicago St. L. & N. O. R. R. v. Doyle,[9] where the court said that the deceased was a fellow-servant of the negligent employee and thus there could be no recovery for his death because, by virtue of his employment, the deceased assumed all the risk of accidents caused by the negligent conduct of another servant.

In all of the cases considered the court denied recovery by merely announcing one or both of the fixed rules without trying to make any logical exceptions or distinctions in the cases. In doing this, was the court favoring the railroad company, or disfavoring the employee? Or did it consider itself so far bound by *stare decisis* as to make it reluctant to create any exceptions which might be deemed innovations?

In the case of *McMaster v. Ill. Cent. R. R.*[10] a brakeman was killed because of the negligence of the conductor on a train other than the one on which the deceased was employed. The injury having occurred in Louisiana, the Mississippi Court recognized the fact that the law of Louisiana would govern the case if there were any Louisiana statutes or decisions applicable. There were no decisions directly in point, but the court of Louisiana had held that a conductor was not a fellow-servant of any other employee on the same train. Thus it seems only logical that our court, following this decision, should have said that the plaintiff and defendant in the present case were not fellow-servants and allowed recovery. However, the court denied recovery. It adhered to the traditional Mississippi viewpoint and refused to be governed by the Louisiana decisions which simply furnished an analogy.

Another case of interest in this connection is *Dowell v. Vicksburg & Meridian R. R.*[11] This was a case involving an injury to an employee caused by violation of a prototype of the present speed-limit statute.[12] By the wording of the statute, *anyone* injured by a train moving at a prohibited rate of speed was entitled to recover. However, the court, in applying the statute to the facts of the instant case, declared that employees were impliedly excluded from its protection. Such an interpretation clearly indicates a predisposition against allowing employees any satisfactory redress against their employer.[13]

The conservatism demonstrated by the above decisions might be attributed to one or all of the factors to which we have referred. Certain it is that during the period embraced by these cases there was an epoch of railroad expansion and strong popular demand for

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[9]60 Miss. 977 (1883).
[10]65 Miss. 264, 4 So. 59 (1887).
[11]61 Miss. 519 (1884).
[12]Miss. Code (1880) § 1047; see also Miss. Code Ann. (1930) § 6130.
[13]For a case where the court seemed ready to allow a recovery when the injury was to one not an employee, see Vicksburg & Meridian R. R. v. Phillips, 64 Miss. 693, 2 So. 537 (1887).

railroading facilities. The huge public debt incurred to encourage expansion in these years is a matter of common knowledge. It is not unlikely that an attitude of friendly encouragement toward the railroad industry made itself manifest through a reluctancy to hold them readily for damages suffered by their employees.

However, it must be borne in mind that the doctrines of no liability were easy to administer. They readily became rules of thumb. Any departure from accepted precedent might easily lead the court into uncharted doctrinal seas; all in defense of a new and unfamiliar peril which a novel industry had brought in its wake. Hence, statements that the court should not depart from or bend the accepted rules of the state in order to effect ideas of justice, were not uncommon.[14]

This attitude was fortified by the sheer novelty of the peril. It was a natural belief that those who entered into the unusually perilous business of railroading should demand a wage which would compensate them for any perils to which they might be exposed. If they neglected to use their bargaining power to their best advantage, this was no concern of the courts. The idea of free agency to contract was part and parcel of the judicial philosophy of the time.

The last decade of the nineteenth century saw radical changes in the master-servant law of Mississippi. The railroads had become better established financially. They no longer needed the financial help of the public and could more easily bear the burden of compensation to injured employees. The people seemed dissatisfied with the granting of an immunity to the railroads and the lack of protection given to employees. They took it upon themselves to abolish the two devices used by the court to protect the railroads. Decidedly influential toward this action also must have been the previous passage of legislation to this effect in other states.[15] The movement, once started, spread rapidly. The way was charted now and not entirely unknown. In addition, legislative agencies were more ready to explore than were the courts.

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[14]In the case of Louisville, N. O. & T. R. R. v. Petty, 67 Miss. 255, 7 So. 351 (1889), the court said: "The [fellow-servant] rule has remained undisturbed by judicial or legislative enactment, and must be regarded as the accepted doctrine of this state; and we must not be expected to follow the devious ways of some courts which, in bending the rule which all acknowledge, to effect their ideas of justice in particular cases, have well nigh destroyed the rule itself. The rule, as held in this state, and in several other states of the United States, and in England, is a simple one, just in its principle, politic in its application, because conservative of life and property, and easily understood and applied, while all efforts to vary and qualify it have involved courts undertaking it in endless contradictions and difficulties." See also Howd v. Miss. Cent. R. R., 50 Miss. 178, 193 (1874).

[15]For discussion of statutes, see 8 LABATT, MASTER & SERVANT (1913) §§ 1750-1802(a).

When the Constitution of 1890 was drafted and adopted, action was taken in regard to both the fellow-servant rule and the doctrine of assumption of risk. Section 193 (which is directed only to railroad corporations) made the fellow-servant rule inapplicable to cases "where the injury results from the negligence of a superior agent or officer, or of a person having the right to control or direct the services of the party injured, also when the injury results from the negligence of a fellow-servant engaged in another department of labor from that of the party injured, or of a fellow-servant on another train of cars, or one engaged about a different piece of work." As to the assumption of risk the section continued: "Knowledge by an employee injured of the defective or unsafe character or condition of any machinery, ways, or appliances, shall be no defense to an action for injury caused thereby, except as to conductors or engineers in charge of dangerous or unsafe cars, or engines voluntarily operated by them." This provision was reenacted *in toto* by the legislature.[16]

The constitutional provision has not been changed down to the present day, but in 1896 the statute was changed so as to make it applicable to every employee of any corporation rather than only the employees of railroad corporations.[17] In *Brooks v. Miss. Cotton Oil Co.*,[18] the statute and amendment were applied and the court held that the evidence justified a verdict for the plaintiff because the fellow-servant rule and assumption of risk had been abolished as to corporations.

A few years later when another suit was brought against the same defendant in *Ballard v. Miss. Cotton Oil Co.*,[19] the defendant attacked the statute on constitutional grounds and this time succeeded. The court said that the statute attempted to impose restrictions on all corporations, without reference to any differences arising out of the nature of their businesses. Such restrictions were not imposed on natural persons and therefore the statute denied corporations the equal protection of the law and was violative of the Fourteenth Amendment of the Federal Constitution. It was said that the enactment drew an unreasonable distinction on the basis of corporateness alone, and would result in imposing liability on a corporation while allowing the defenses of the fellow-servant rule and assumption of risk to private individuals engaged in the same kind of business. The court distinguished an earlier case decided by the Supreme Court of the United States which upheld a statute that distinguished railroads from other businesses.[20]

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[16]Miss. Code (1892) § 3559.
[17]Miss Laws 1896 c. 87, p. 97.
[18]76 Miss. 874, 25 So. 479 (1899).
[19]81 Miss. 507, 34 So. 533, (1902).
[20]Missouri R. R. Co. v. Mackey, 127 U. S. 205 (1888).

In recent years the Federal Supreme Court has shown itself more inclined to distinguish corporations from individuals on the sole ground of corporateness,[21] and it is quite possible that if the problem of the *Ballard* case had come up today for the first time a different result would be reached.[22] But since the *Ballard* case has actually been decided, the court would probably consider the matter a closed question today. Indeed, five years after the decision an attempt was made to reopen the question.[23] The court vigorously declined to do so, listing the following reasons:

> "First, that that case was considered for two years by this court; second, that it was argued four time orally; third, that it received the concurrence of five of the judges of this court; fourth, that every argument that has been advanced now to show that the mere fact of incorporation was a defense was earnestly pressed in the argument of the Ballard case; fifth, that that case had stood as the law of the land for some years without question. It is simply a waste of time to ask this court to overrule a case so thoroughly and patiently considered, and which has been so long established as the law of the land."

Today in the present Code[24] the doctrine of assumption of risk is abolished as to any employee (whether employed by a corporation or an individual) where the injury or death results in whole or in part from the negligence of the master, except conductors or locomotive engineers in charge of dangerous cars or engines voluntarily operated by them.

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[21]See, for example, White River Co. v. Arkansas, 279 U. S. 692 (1929); Florida Cent. & C. R. R. Co. v. Reynolds, 183 U. S. 471, 480 (1901); and New York v. Barker, 179 U. S. 279 (1900).

[22]A different result was reached as to the constitutionality of an Arkansas Statute which abrogated the fellow-servant rule in regards to "all corporations of every kind and character". The validity of this statute was upheld by the State Supreme Court, with respect to a domestic corporation engaged in the lumber business, on the ground that it was a reasonable exercise of the reserved right of the legislature to amend the company's charter. Ozan Lumber Co. v. Biddie, 87 Ark. 587, 113 S. W. 796 (1908). In a later case the same ruling was made by that state court with reference to a foreign corporation operating a railroad. An appeal was taken, on this decision, to the Supreme Court of the United States which refused to express an opinion concerning the question raised that the statute was discriminatory in that it included all corporations, and not individuals or partnerships. The judgment of the state court was affirmed and the distinction upheld by the Federal Supreme Court as not offending against the Constitution of the United States. The company, being engaged in operating a railroad, was not in a position to plead that there was unlawful discrimination. Aluminum Co. v. Ramsey, 89 Ark. 522, 117 S. W. 568 (1909), *Aff'd.* 222 U. S. 251 (1910).

[23]Bradford Construction Co. v. Heflin, 88 Miss. 314, 42 So. 174 (1906).

[24]See MISS. CODE ANN. (1930) §§ 513, 6154. See also MISS. CONST. (1890) § 193.

The present statutory and constitutional provisions are probably not open to constitutional objections. The constitutional provision was held not to violate the Constitution of the United States in the case of *Mobile, Jackson & K. C. R. R. Co. v. Turnipseed*,[25] although this provision was limited to railroad corporations.[26] Section 513 of the Code applies to any employees, while § 6154 applies to employees of any railroading enterprise or business and is not limited to corporations. Thus there seems to be no ground for contending that these sections violate the equal-protection clause of the Federal Constitution even though the clause be applied as strictly as in the *Ballard* Case.

Fletcher F. Veazey, Jr.

Master's Tort Liability To Servant In Mississippi

II.

The Fellow-Servant Rule

The fellow-servant rule has nominally been an integral factor in personal injury cases arising from the master and servant relation. Phraseology of definitions varies as widely as application to discrete instances; but the primary import is the same. The doctrine may be briefly stated as follows: "A master is not bound to indemnify one servant for injuries caused by the negligence of another servant in the same common employment as himself, unless the negligent servant was the master's representative."[1] Almost invariably expressed in terms of negligence, the doctrine has, however, been applied to wilful acts.[2] Naturally, questions immediately arise as to what matters and persons come within the terms of so general a statement. Much judicial confusion and divergence has arisen on this point and inquiry is usually unproductive.

[25]In Bradford Construction Co. v. Heflin, 88 Miss. 314, 42 So. 174 (1906), it was pointed out that "Section 193 of the Constitution of 1890 was adopted after the decision of the United States Supreme Court in Missouri R. R. Co. v. Mackey, 127 U. S. 205 (1888) and was manifestly intended to authorize legislation along lines held constitutional in that case—that is to say, to abolish the fellow-servant rule in the case of employees of railroad corporations whose business it was known to be inherently dangerous—". This section of the constitution and classification of employees thereunder was discussed in the case of Mobile, J. & K. C. R. R. Co. v. Turnipseed, 119 U. S. 36 (1910). See also L. & M. R. R. v. Melton, 218 U. S. 36 (1910). The Mississippi Court in the Ballard case seems to have closed its eyes to the fact that the section is confined to railroad *corporations* and that it would not apply to *individuals* engaged in such business.

[1]4 Labatt, Master & Servant (1913) § 1393, p. 4007 (Various forms of stating the rule are given in the notes).

[2]Petroleum Iron Works v. Bailey, 124 Miss. 11, 86 So. 644 (1920); Great Southern Lbr. Co. v. May, 138 Miss. 27, 103 So. 363 (1924); McCarty v. Mitchell, 169 Miss. 82, 151 So. 567 (1933).

The fellow-servant doctrine originated in England in 1837, and shortly thereafter invaded the American courts.[3] In the explanations advanced for its basis, as in other phases of the doctrine, variety predominates. Perhaps the statement most frequently adhered to is that the servant impliedly undertakes to bear the risks of the negligence of a fellow-servant who has been selected with ordinary care by the master.[4] The true foundation of the doctrine seems to rest in considerations of policy, based on the utility of imposing the risk on those whose position enables them to guard best against it.[5] Similarly, the fellow-servant doctrine has been regarded as promoting careful conduct among employees and expediting the progress of work.[6]

Formulated in a society primarily non-industrial, the fellow-servant rule rapidly demonstrated its impolicy. The changing economic and social structures of the 19th century, The Industrial Revolution and the emergence of corporate predominance, demanded modification of the rule. Judicial retrenchment and legislative limitation followed. The modifications and exceptions have become so numerous that in comparison with its original import the rule has become vestigial.[7] The doctrine has encountered criticism and acclaim alike, dependent largely on the prevailing economic structure of the jurisdiction and the predilections of appellate courts. The present discussion is confined to a general discussion of the rule and its restrictions, without allusion to the special statutory modifications.

The strict adherence to, and application of the fellow-servant doctrine, so marked in the earlier decisions, seems a thing of the past. The manifest need for change proved weightier than the considerations dictating retention of a simple self-determining rule. Consequently, as the character of the act causing injury becomes

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[3]Priestly v. Fowler, 3 M. & W. 1, 150 Eng. Rep. 1030 (1837); Murray v. South Carolina R. Co., 1 McMullan 385 (S. C. 1841); Farwell v. Boston & Worcester R. Co., 4 Metc. 49 (Mass. 1942).

[4]4 LABATT, MASTER & SERVANT (1913) § 1395, p. 4014.

[5]Farwell v. Boston & Worcester R. Co. 4 Metc. 49 (Mass. 1842).

[6]18 R. C. L. § 194, p. 716.

[7]18 R. C. L. § 194 p. 716; MCKINNEY, FELLOW SERVANTS (1890) c. 7. A reading of the early Mississippi decisions discloses an extremely strict application of the fellow-servant rule. An indication of the changed attitude is found in the Mississippi statutes dealing with the question. MISS. CONST. (1890) § 193 substantially abrogated the rule as applied to employees of railroad corporations. These provisions were later extended to employees of "any corporation" [Miss. Laws (1898) c. 66]; but this act was held unconstitutional in Ballard v. Miss. Cotton Oil Co., 81 Miss. 507, 34 So. 533 (1902). In Bradford Construction Co. v. Heflin, 88 Miss. 314, 42 So. 174 (1906), § 193 of the Constitution was held applicable only to railroads operating as common carriers. Miss. Laws (1908) c. 194 extended the provisions of Section 193 to railroad corporations "and all other corporations and individuals, using engines, locomotives or cars of any kind or description whatsoever, propelled by the dangerous agencies of steam, electricity, gas, gasoline or lever power, and running on tracks". These provisions are now incorporated into MISS. CODE ANN. (1930) § 6154.

more nearly related to or connected with fault of the master, the tendency has been not to apply the doctrine. Injuries arising in the nature of the work itself, or directly attributable to acts, negligent or wilful, of the co-employee in his individual capacity, are the hazards from which protection is denied.

Typically illustrative are the cases denying recovery where a servant is injured through the negligence of a driver while being transported to and from work.[8] Yet in situations of this type the court has refused to apply the rule where the transportation was not an integral part of the employment, but was in the nature of a special undertaking by the master.[9] Likewise, when the plaintiff was ordered to ride on the running board of a truck by a co-employee who had assumed to act as a foreman, the doctrine was held inapplicable.[10]

Where the negligence complained of consisted of a failure to perform some operative task of a simple nature the doctrine has been applied. Characteristic examples are where a blacksmith's helper carelessly swung a sledge,[11] and where a foreman turned a valve lever causing gas to flow in a pipe under inspection by the plaintiff.[12] The fellow-servant rule applies where one employee commits an assault on another, in the absence of a showing that the master knew of the dangerous propensities of the assaulting servant, or that the assaulter occupied a superior position.[13]

The evolution of master-and-servant law has been characterized by a gradual restriction of the rules immunizing the master from liability. Constant limitation of exempting doctrines has resulted in substantial extension of the employer's liability. A consideration of the modifications and qualifications of the fellow-servant rule will serve to indicate the trend.

The earliest limitation on the fellow-servant rule was the rule regarding competency of the co-employee. If the master employs servants which are known to be incompetent, or which he reasonably should have known were incompetent, he is liable for an in-

[8]Great Southern Lbr. Co. v. Hamilton, 137 Miss. 55, 101 So. 787 (1924); Ozen v. Sperier, 150 Miss. 458, 117 So. 117 (1928); Beale & Strayhorn v. Clayborn, 152 Miss. 681, 120 So. 812 (1928) (person engaging in work at request of employee subject to fellow-servant rule); Greer v. Pierce, 167 Miss. 65, 147 So. 303 (1933) ("One fellow-servant is liable to another fellow-servant for his negligence in proximately causing the injury of the latter"); Buckley v. United Gas Public Service Corp., 176 Miss. 282, 168 So. 462 (1936); Charles Weaver & Co. v. Harding, 182 Miss. 345, 180 So. 825 (1938).

[9]Hamilton Bros. Co. v. Weeks, 155 Miss. 754, 124 So. 798 (1929).

[10]Russell v. Williams, 168 Miss. 181, 150 So. 528 (1933).

[11]Ingram Day Lbr. Co. v. Joh, 107 Miss. 43, 64 So. 934 (1914).

[12]Harper v. Public Service Corp., 170 Miss. 39, 154 So. 266 (1934).

[13]Petroleum Iron Works v. Bailey, 124 Miss. 11, 86 So. 644 (1920); Great So. Lbr. Co. v. May, 138 Miss. 27, 103 So. 363 (1924); McCarty v. Mitchell, 169 Miss. 82, 151 So. 567 (1933).

jury to a fellow-servant occasioned by such incompetency. Also if the master retains an incompetent servant after notice of the disqualification, liability is imposed.[14] The incompetency, however, must be of a type that is likely to produce injury, and it will not suffice to show that the fellow-servant was inefficient. The incompetency must be such that the master might reasonably anticipate injury to the fellow-servants of the incompetent.[15]

In *Cecil Lumber Co. v. McLeod*,[16] plaintiff's clothes became caught in running machinery; the employee operating the controls was deaf and failed to hear plaintiff's shout to stop the gears. The deafness of the operator was known to the master. In imposing liability a majority of the court held that although the deaf servant was not specifically charged with the duty of watching out for the safety of the employees, he would have heard the cry in time to prevent the injury had it not been for his deafness, and that the employment of such a servant materially increased the dangers of the work.

A further qualification receiving wide application in recent cases is the exception embracing "absolute" or "non-delegable duties" of the master. The need for such an exception is apparent when it is remembered that the vast majority of employers are corporations, which in their very nature, can act only through individuals having a common employer. This modification declares that there are certain obligations which are personal, positive, and primary duties which the master is bound to perform. Such duties being postulated, it follows that the master must see that they are performed with reasonable care, whether discharged personally or confided to an employee.[17] The duties which are generally said to be non-delegable include the duty to give warning and instructions to youthful and inexperienced employees; the duty to furnish a reasonably safe place to work and reasonably safe instrumentalities; to promulgate and enforce reasonable rules and regulations for the conduct of the work; to provide competent and sufficient servants; to provide a reasonable system for the inspection of instrumentalities; and statutory duties.[18]

The principle most frequently resorted to in evasion of the fellow-servant rule is the master's duty to provide a reasonably safe place to work. The court has repeatedly reiterated the statement that the fellow-servant rule has no application where the master

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[14]Howd v. Miss. Cent. Ry. Co., 50 Miss. 178 (1874); Ingram Day Lbr. Co. v. Joh, 107 Miss. 43, 64 So. 934 (1914); Cecil Lbr. Co. v. McLeod, 122 Miss. 767, 85 So. 78 (1920).

[15]Ingram Day Lbr. Co. v. Joh, 107 Miss. 43, 64 So. 934 (1914).

[16]122 Miss. 767, 85 So. 78 (1920). (Smith and Sykes, JJ. dissenting.).

[17]4 LABATT, MASTER & SERVANT (1913) § 1480; 18 R. C. L. § 206.

[18]4 LABATT, MASTER & SERVANT (1913) §§ 1495 *et seq.*; 18 R. C. L. §§ 207 *et seq.*

has failed to provide a reasonably safe place to work.[19] The duty cannot be delegated to an employee and if the master does provide an employee who is to discharge this obligation he is bound to see that the employee uses reasonable care in performance of the duty. If the servant to whom performance is delegated neglects the duty, his negligence is that of the master. It is no defense to say that the master selected a competent delegate and that such person is a fellow-servant of the injured employee. In regard to the performance of the non-delegable duties of the master, he is not a fellow servant, but is regarded as the representative of the master, and liability ensues on the doctrine of *respondeat superior*. Illustrations are found in cases where the master has designated a particular servant to perform the task of repairing or making the premises or instrumentalities safe. In such cases the master is liable although the negligent employee may be a fellow-servant in all other respects. In *Miss. Utilities Co. v. Smith*,[20] plaintiff was injured by a defective truck, another employee being employed to keep the machinery in repair. In affirming a judgment for plaintiff the court said:

> "Of course if it was the duty of Smith, the appellee, to keep the truck in repair, if he had been employed for that purpose and neglected to perform his duties in that regard, he could not recover for an injury, because a party cannot recover for his own wrong. . . . the proof shows that another person was employed for that particular purpose, and such employee when acting in that capacity, was discharging a duty for which the master was bound. *In other words, such employee was discharging a non-delegable duty and was not a fellow servant within the legal meaning of that term.*"[21] (Italics added).

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[19]Murray v. Natchez Drug Co., 100 Miss. 260, 56 So. 330 (1911) (escaping gas in building causing explosion); Finkbine Lbr. Co. v. Cunningham, 101 Miss. 292, 57 So. 916 (1911) (accumulated sawdust on floor); Masonite Corp. v. Lochridge, 163 Miss. 364, 140 So. 223 (1932) (co-employees failed to ground table on which plaintiff was changing electrical switch); Wilbe Lbr. Co. v. Calhoun, 163 Miss. 80, 140 So. 680 (1932) (unguarded ripsaw threw lumber against plaintiff); Miss. Utilities Co. v. Smith, 166 Miss. 105, 145 So. 896 (1932) (plaintiff injured by truck backfire though another employee had been employed for the particular purpose of repairing machinery and equipment); Gulf Refining Co. v. Ferrell, 165 Miss. 296, 147 So. 476 (1933) (plaintiff injured while painting sign in street: "If the negligence of the master in failing to provide and maintain a reasonably safe place for the servant to work, or to warn the servant of his danger, contributes to the injury of such servant, the master would be liable in spite of the concurring negligence of a third person."); Jefferson v. Denkmann Lbr. Co., 167 Miss. 246, 148 So. 246 (1933) (insufficient number of co-workers); Barron Motor Co. v. Bass, 167 Miss. 787, 150 So. 202 (1933) (foreman laid knife on table preparatory to assisting plaintiff in manual labor); Curry & Turner Construction Co. v. Bryan, 185 So. 256 (Miss. 1939) (employer failed to provide methods of distinguishing can containing gasoline from can containing kerosene).

[20]166 Miss. 105, 145 So. 896 (1933).

[21]166 Miss. 105, 121, 145 So. 896, 899 (1933).

Somewhat related to the duty to provide a reasonably safe place to work, is the duty of the master to promulgate rules and regulations concerning the conduct of the work. In *Edwards v. Haynes-Walker Lumber Co.*[22] one of the plaintiff's duties was to oil a bit-saw mandrel. While the machinery was at rest the place was safe, but highly dangerous when the machine was in operation. It was the custom for the plaintiff to oil the mandrel while the machinery was stopped at noon, and before operation was resumed a signal was given by blowing the whistle. On the occasion of the injury the machinery was started by a fellow employee earlier than usual and without the whistle being blown. The lower court granted a peremptory instruction for the defendant. On appeal the Supreme Court reversed this ruling saying:

> "It was the nondelegable duty of the master to see that the custom was carried out, in order that the place to work be made safe. . . . When it is kept in mind that the place where appellant was required to work was only safe while the machinery was not in motion, it will be perceived that appellee had not provided a safe place if he failed to adopt some system to insure that the machinery would not be started while appellant was at work. This failure of the system was the fault of the master, for the obvious reason that he could not hide behind the skirts of a fellow servant when it was his positive and nondelegable duty to keep the place safe and see to it that his apparatus was properly used."[23]

Whenever the nature of the work is such that the installation of a system would operate to decrease the dangers of employment, the master is under a duty to provide suitable regulations and methods. The Mississippi court has been exceedingly strict in the application of the doctrine. It is not enough that the master promulgates rules and regulations; he is under an absolute duty to see that the *rules are carried out.* As in cases of other non-delegable duties, the rank or position of the offending servant is immaterial, and the master is liable for an omission or act of an employee in performing a non-delegable duty of the master. In *Albert v. Doulutt & Ewin,*[24] plaintiff's decedent was employed to clear brush accumulating in the process of clearing a right of way. Another crew was engaged in felling trees and failed to give the warning required. The lower court granted a peremptory instruction for the defendant. This holding was reversed, the court saying:

> "Whenever the master's work is complex and dangerous, he should safeguard his servants by the adoption of approved methods and the promulgation of rules and reg-

[22]113 Miss. 378, 74 So. 284 (1917).
[23]113 Miss. 378, 383, 74 So. 284, 285 (1917).
[24]180 Miss. 626, 178 So. 312 (1938).

> ulations for the safety of his employees, and he does not discharge his duty by the mere promulgation of the rules for the guidance of his servants—*he is bound to see that such rules are enforced.* . . . In order to make the place reasonably safe it was the duty of the master by warning or otherwise to guard against the danger of falling trees. That duty was nondelegable, therefore the failure of the fellow servant to carry it out was a failure of the master."[25] (Italics added).

Where the negligence complained of consists, not in the failure to conform to the system instituted, but in the deficiencies of the system itself, the master has been held liable.[26] In *Scott Burr Stores Corp. v. Morrow*,[27] where an elevator shaft was habitually left open, in imposing liability the court cited the *Doulutt* case and held that the master was *bound* to see that the rules were enforced. However, the court continued, saying:

> "Under this pronouncement of the law, it was likewise the duty of the appellant in the case at bar not only to demand and insist that the opening into the elevator shaft should be kept closed, . . . but there also existed the duty of *exercising reasonable care* to see to it that it was kept closed."[28] (Italics added).

It would seem that in cases involving the failure to carry out regulations under a system, a distinction should be made between acts partaking of the nature of the master's non-delegable duty and acts which are mere operative details which might legitimately not be the object of rules and supervision. If the servant's fault consists of neglect in some matter of mere detail, unrelated to the non-delegable duty of the master, the fact that it was systematized should not operate to render the master's liability absolute.[29]

A further exception to the fellow-servant doctrine often invoked is the vice-principal, or superior-servant rule. Under this limitation, liability is imposed on the master for acts of a co-worker who exercises supervisory control over the injured servant, occupying a higher rank and position, or who is performing a non-delegable duty of the master. Divergence of opinion is prevalent as to what are the criteria in determining whether a person acts

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[25]180 Miss. 626, 633, 634, 635, 178 So. 312, 313 (1938).

[26]Adams v. Hicks, 181 Miss. 165, 178 So. 484 (1937) (horses and cattle driven in same passageway); Jefferson v. Virginia Chemical Co., 185 So. 230 (Miss. 1939) (servants had adopted a system which employer ordered changed in the interests of hastening the work).

[27]182 Miss. 743, 180 So. 741 (1938). This case seems to involve a failure to furnish a reasonably safe place to work rather than failure to enforce a system. *Cf.* Foster Packing Co. v. Lamey, 5 F. (2d) 23, 24 (C. C. A. 5th, 1925).

[28]182 Miss. 743, 750, 180 So. 741, 743 (1938).

[29]4 LABATT, MASTER & SERVANT (1913) § 1506, p. 4500.

as a vice-principal in a particular case. Some cases proceed on the theory that the superiority of position alone is determinative of the question.[30] Others place the decision on the character of the act the vice-principal was performing at the time of the injury.[31] A more rational induction seems to lead to the conclusion that the proper basis for the imposition of liability is a combination of both of these factors. In other words, the master is held liable for the acts of a servant of superior rank when he acts in his supervisory capacity; but he also is liable for the negligence of an employee who is performing a non-delegable duty of the master, and this irrespective of the servant's rank and status in the employment. If an employee has the right to direct and control the manner of work, he is a representative for whose negligence the master is liable.[32]

A limitation on liability under the vice-principal doctrine is the doctrine of "dual capacity." In substance this doctrine is that, although a servant may occupy a superior rank to that of the injured servant, when the superior servant actually engages in a task of manual labor in immediate co-operation with a co-worker, he is, as to the ordinary incidents of that particular task, a fellow-servant.[33] In *Harper v. Public Service Corp.*,[34] The court said:

> ". . . the master is liable only for those acts of the foreman or superior agent which are official or managerial acts, those done by him in the actual exercise of his supervisory authority, and not for those which pertain to the duties or labor of a workman, those done by him when engaged then and there in the manual or operative work of a laborer, having reference at this point, of course, to those acts of labor or fellow service which belong to the details of the work and not to those duties which are non-delegable by the master".

Consequently in the application of this doctrine it has been held that a section master and a section hand were fellow-servants when the inferior servant was injured while holding a "fish bar"

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[30]18 R. C. L. § 215, p. 743.

[31]4 LABATT, MASTER & SERVANT (1913) § 1433, p. 4142.

[32]Gwin v. Carter, 158 Miss. 196, 130 So. 597 (1930). See also Bradford v. Taylor, 85 Miss. 409, 37 So. 812 (1904); J. J. Newman Lbr. Co. v. Dantzler, 107 Miss. 31, 64 So. 931 (1914); Barron Motor Co. v. Bass, 167 Miss. 787, 150 So. 202 (1933); Russell v. Williams. 168 Miss. 181, 150 So. 528 (1933); Harper v. Public Service Corp., 170 Miss. 39, 154 So. 266 (1934); Gow v. Hunter, 175 Miss. 896, 168 So. 264 (1936). But an inferior servant is the fellow servant of a superior servant, McCarty v. Mitchell, 169 Miss. 82, 151 So. 567 (1933).

[33]Gwin v. Carter, 158 Miss. 196, 130 So. 597 (1930).

[34]170 Miss. 39, 43, 154 So. 266 (1934).

which the superior was striking in an attempt to straighten it.[35] Similarly, where a foreman turned on a valve discharging gas through a pipe which he and plaintiff were inspecting.[36]

Of interest are the decisions where the doctrine of dual capacity was urged as a defense but rejected by the court. In *Gwin v. Carter*,[37] plaintiff was working under one Halphin who had the right to direct and control the manner of work. Halphin instructed plaintiff as to the manner of loading and unloading a wheelbarrow, and claiming that plaintiff disobeyed him, struck and cursed him. In affirming a verdict for the plaintiff the court held that plaintiff's injury was a result of the foreman's attempt to control the manner of work, and not caused by the foreman's act in his capacity of co-worker.

In *Barron Motor Company v. Bass*,[38] the mechanic who usually assisted plaintiff in welding work was engaged at another task, and the foreman undertook to aid the plaintiff. Plaintiff proceeded to the welding table; the foreman followed and placed a draw knife on the table, without the knowledge of the plaintiff. In turning the windshield which was being welded, plaintiff's hand came in contact with the knife and was injured. The Supreme Court rejected the defendant's contention that the dual-capacity doctrine applied, and held that the relation of fellow-servant did not begin until the superior servant actually and actively engaged in the particular manual task and the progress of the work began. It added that since the knife had no use in or connection with the task about to be undertaken, the foreman had not actually engaged upon the manual work when he left his place and started towards the table and laid the knife thereon.

In *Russell v. Williams*,[39] one Carpenter directed workers to enter a truck for transportation to their work, and there was testimony that he directed plaintiff to ride on the running board. Carpenter drove the truck and failed to signal for a turn and a collision ensued. The court held that although there was no evidence that express authority had been given to Carpenter, there was evidence to show that Carpenter had been acting as a foreman for some time, and that if the employer had knowledge of this assumption of authority, liability would be imposed as if the superior rank had been expressly conferred. In answer to the defendant's contention that the alleged foreman was acting in a mere

[35]Lagrone v. M. & O. R. Co., 67 Miss. 592, 7 So. 432 (1890).
[36]Harper v. Public Service Corp., 170 Miss. 39, 154 So. 266 (1934). See also Hercules Powder Co. v. Hammack, 145 Miss. 304, 110 So. 676 (1926); Petroleum Iron Works v. Bailey, 124 Miss. 11, 86 So. 644 (1920); Buckley v. United Gas Corp., 176 Miss. 282, 168 So. 462 (1936).
[37]158 Miss. 196, 130 So. 597 (1930).
[38]167 Miss. 786, 150 So. 202 (1933).
[39]168 Miss. 181, 150 So. 528 (1933), *sugg. err. overr.* 151 So. 372 (1933).

matter of administrative detail (dual-capacity doctrine), the court said that the fellow-servant rule had no application to cases where by express order of the superior agent the servant was placed in a position not reasonably safe for the employment.

Assault Cases

The fellow-servant rule has been generally applied in cases of assault committed by one employee on another. In such cases the primary inquiry is whether the assaulting servant's act was within the "scope of his employment" or "in furtherance of the master's business." Unless this question is answered in the affirmative, no liability can be imposed. The master is not to be held accountable for the wilful conduct of an employee independent of the work engaged in.

The two devices usually adopted to avoid the application of the fellow servant rule in these situations are: (1) that the master was negligent in employing or retaining a servant of known dangerous propensities, or (2) that the offending servant was a vice-principal. These secondary considerations do not come into play at all unless the basic inquiry as to whether the servant was acting in the course of his employment is first answered in favor of the plaintiff.[40]

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[40]Hines v. Cole, 123 Miss. 254, 85 So. 199 (1920) (assault held not in course of employment where committed after argument over repairing of employer's railroad cars); Hines v. Green, 125 Miss. 476, 87 So. 649 (1921) (engineer who shot conductor in anger at delay in switching cars held acting in course of employment), judgment reversed 260 U. S. 349 (1922) (it was held that court erroneously assumed the Federal and State rule as to liability were same; also that the act was not within the scope of employment); Petroleum Iron Works v. Bailey, 124 Miss. 11, 86 So. 644 (1920) (assaulting employee held not acting within scope of employment); Great So. Lbr. Co. v. May, 138 Miss. 27, 103 So. 363 (1924) (judgment for defendant); Alden Mills v. Pendergraft, 149 Miss. 595, 115 So. 713 (1927) (superior employee who assaulted plaintiff and intimidated him to prevent the demanding of increased wages, held acting in furtherance of master's business); Gwin v. Carter, 158 Miss. 196, 130, So. 597 (1930) (foreman who struck plaintiff for failure to obey orders, held to be acting for the master); McCarty v. Mitchell, 169 Miss. 82, 151 So. 567 (1933) (inferior employee who attempted to drag superior into moving machinery, held not acting in scope of employment).

RECENT DECISIONS

EVIDENCE—PRELIMINARY HEARING TO DETERMINE ADMISSIBILITY OF DYING DECLARATION—REQUIREMENT THAT JUDGE BE CONVINCED BEYOND A REASONABLE DOUBT

In a prosecution for homicide the State offered in evidence certain statements made by the deceased a short time before his death. The trial court held a preliminary hearing in the absence of the jury to determine whether the statements were competent as a dying declaration, and then admitted the evidence. Defendant appealed from this ruling. HELD: The trial court erred in admitting the testimony because its competency was not shown "beyond a reasonable doubt". *Baylis v. State*, 182 Miss. 794, 183 So. 527 (1938).

This doctrine, consistently followed in cases involving dying declarations in Mississippi,[1] has not been generally accepted in other jurisdictions.[2] Although the court has never attempted to justify the rule, its existence may be explained on two possible bases.

(1) In all criminal prosecutions the State must prove its case to the jury "beyond a reasonable doubt". It must, therefore, establish the admissibility of its evidence "beyond a reasonable doubt".

(2) The courts are rather skeptical of dying declarations as evidence, and therefore require proof of its competency by a higher standard than is ordinarily necessary.

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[1]Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1898), 76 Miss. 223, 25 So. 158 (1899) (Leading Case); Guest v. State, 96 Miss. 871, 52 So. 211 (1910); Fannie v. State, 101 Miss. 378, 58 So. 2 (1912); McNeal v. State, 115 Miss. 678, 76 So. 625 (1917); McLeod v. State, 130 Miss. 83, 92 So. 828 (1922); Jones v. State, 133 Miss. 842, 98 So. 340 (1923); Wilkerson v. State, 134 Miss. 853, 98 So. 770 (1924); Hathorn v. State, 138 Miss. 11, 102 So. 771 (1925); Wade v. State, 147 Miss. 479, 112 So. 677 (1927); Muse v. State, 158 Miss. 449, 130 So. 693 (1930); Smith v. State, 161 Miss. 430, 137 So. 96 (1931);

[2]The following courts repudiate the "reasonable-doubt" rule, and hold that proof by a "preponderance of the evidence" is sufficient: Lackey v. State, 67 Ark. 416, 55 S. W. 213 (1900); Lasater v. State, 77 Ark. 468, 94 S. W. 59 (1906); Hall v. State, 125 Ark. 263, 188 S. W. 801 (1916); Moody v. State, 1 Ga. App. 772, 58 S. E. 262 (1907); Childs v. State, 18 Ga. App. 782, 90 S. E. 723 (1916); People v. Guido, 321 Ill. 397, 152 N. E. 149 (1926); People v. Bartz, 342 Ill. 56, 173 N. E. 779 (1930); Commonwealth v. Robinson, 146 Mass. 571, 16 N. E. 452 (1888); Commonwealth v. Bond, 170 Mass. 41, 48 N. E. 756 (1897); Commonwealth v. Russ, 232 Mass. 58, 122 N. E. 176 (1919); State v. Bordeleau, 118 Me. 424, 108 Atl. 464 (1920); Scott v. State, 107 Ohio St. 475, 141 N. E. 19 (1923). The Mississippi rule seems to find support in the following cases: People v. Profumo, 23 Cal. App. 376, 138 Pac. 109 (1913); People v. Singh, 182 Cal. 457, 188 Pac. 987 (1920); Starkey v. People, 17 Ill. 21 (1855); Westbrook v. People, 126 Ill. 81, 18 N. E. 304 (1888); People v. White, 251 Ill. 67, 95 N. E. 1036 (1911); People v. Corder, 306 Ill. 264, 137 N. E. 845 (1922); People v, Maria, 359 Ill. 231, 194 N. E. 510 (1935); State v. Martin, 76 Mont. 565, 248 Pac. 176 (1926).

(1) If the first of these theories is accepted, the doctrine does not appear to be in accord with the general principles involved in the determination of the admissibility of evidence. It is not ordinarily necessary for a party to establish the competency of his evidence by the same standard by which he must establish his case on the merits. The determination of the competency of evidence is for the court alone; and, after the court has admitted the testimony, the credibility and weight to be given it is for the jury.[3] The fact of the admission of the evidence by the judge does not in a legal sense give it any greater weight with the jury. It does not affect the burden of proof, or change the duty of the jury in weighing the whole evidence. They still must be satisfied, in a criminal case, upon the whole evidence, beyond a reasonable doubt.[4]

Support for the first theory may be found in an examination of the Mississippi cases involving the admissibility of *confessions*. Confessions and dying declarations are both offered as evidence in criminal prosecutions. The competency of both must be proven in a preliminary hearing by the party offering them in evidence. In neither case will the Mississippi Supreme Court approve of their admission, unless it believes that the trial court was properly satisfied of their competency beyond a reasonable doubt.[5] This might seem to indicate that it is not making an exception in the case of dying declarations, but is applying the test on the merits to all preliminary hearings in criminal cases.

On the other hand, the question does not appear to have arisen with respect to a preliminary hearing to determine the competency of any other type of evidence in Mississippi. This fact may indicate that there is a general recognition that confessions and dying declarations are both particularly damaging to the criminal defendants.[6]

In order to succeed on the merits in any criminal prosecution the State must prove its case beyond a reasonable doubt; the defendant, on the other hand, must establish only an element of doubt.[7] Under the first theory with

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[3]McDaniel v. State, 8 S. & M. 401 (Miss. 1847); Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1898), 76 Miss. 223, 25 So. 158 (1899); Bell v. State, 72 Miss. 507, 17 So. 232 (1895); Jones v. State, 79 Miss. 309, 30 So. 759 (1901); Gurley v. State, 101 Miss. 190, 57 So. 565 (1912); Conway v. State, 177 Miss. 461, 171 So. 16 (1936).

In Marley v. State, 109 Miss. 717, 69 So. 210 (1915), the jury was allowed to review the finding of the court as to whether the dying declaration was competent. This case is inconsistent with the well established Mississippi rule, however, and has not been followed.

[4]Johnson v. State, 79 Miss. 42, 30 So. 39 (1901); Shaw v. State, 30 So. 42 (1901); Cumberland v. State, 110 Miss. 521, 70 So. 695 (1915); Garland v. State, 130 Miss. 310, 94 So. 210 (1922).

[5]Confessions: Garrand v. State, 50 Miss. 147 (1874); Simmons v. State, 61 Miss. 243 (1883); Ellis v. State, 65 Miss. 44, 3 So. 188 (1887); Whip v. State, 143 Miss. 757, 109 So. 697 (1926). For cases involving the reasonable doubt rule as applied to dying declarations, see note 1, *supra*.

[6]This might also be an indication that the issue has never been *urged* in regard to any other type of evidence.

[7]See authorities cited *supra* note 4.

respect to the basis for the Mississippi rule, the State would bear the burden of proving admissibility of its evidence beyond a reasonable doubt; while the defendent would need only to establish an element of doubt as to admissibility of that evidence. A consideration of the Mississippi cases in which the *defendant* offers a dying declaration, however, will show that the court is not applying the reasonable-doubt test to such declarations solely because it is the test required on the merits of the case. If the test used in a trial of the case on the merits were applied to a preliminary hearing in which the *defendant* offers the evidence, its logical application would require that the *State* prove its *incompetency* beyond a reasonable doubt. This deduction, however, is not followed in the application of the reasonable-doubt rule. On the contrary, when a defendant offers a dying declaration in evidence, *he* must establish its competency *beyond a reasonable doubt.*[8] The burden of proof in such issue is always upon the party offering the evidence.[9]

(2) In a discussion of the second suggested theory, it may be well to examine the nature of the evidence considered under the reasonable-doubt doctrine. Dying declarations, admissible only in criminal proceedings where the defendant is on trial for the death of the declarant, depend for admissibility upon an exception to the hearsay evidence rule. To be admissible such statements must conform to certain well established requisites. They must be made under the realization and solemn sense of immediate impending death.[10] They must be the utterances of a sane mind. They are restricted to the act of the killing and the circumstances immediately attending it and forming a part of the *res gestae,* or to the identity of the assailant. No declaration or any part of it is admissible unless it would be competent and relevant if made by a living witness.[11]

The tendency of the courts is to restrict the use of this type of evidence. Such statements are usually made when the declarant is in great physical pain, and when his mind and memory are likely to be impaired by his injuries.

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[8]Green v. State, 89 Miss. 331, 42 So. 797 (1906); Sparks v. State, 113 Miss. 266, 74 So. 123 (1917); Scott v. State, 166 Miss. 6, 148 So. 239 (1933); McNair v. State, 171 Miss. 358, 157 So. 908 (1934).

[9]McDaniel v. State, 8 S. & M. 401 (Miss. 1847); Brown v. State, 32 Miss. 433 (1856); Bell v. State, 72 Miss. 507, 17 So. 232 (1895); Sparks v. State, 113 Miss. 266, 74 So. 123 (1917); McNeal v. State, 115 Miss. 678, 76 So. 625 (1917); Haney v. State, 129 Miss. 486, 92 So. 627 (1922); Smith v. State, 161 Miss. 430, 137 So. 96 (1931); Scott v. State, 166 Miss. 6, 148 So. 239 (1933).

[10]While the court uses the term "immediate impending death", a very liberal construction of the word "immediate" is given. For example, see Dean v. State, 173 Miss. 254, 160 So. 584 (1935), *sugg. err. overr.,* 173 Miss. 257, 162 So. 155 (1935), in which statements made four and five days before the declarant's death were held admissible.

[11]For the requirements for admissibility, see: Bell v. State, 72 Miss. 507, 17 So. 232 (1895); Lipscomb v. State, 75 Miss. 559, 23 So. 219 (1898), 76 Miss. 223, 25 So. 158 (1899); Guest v. State, 96 Miss. 871, 52 So. 211 (1910); McLeod v. State, 130 Miss. 83, 92 So. 828 (1922); Hathorn v. State, 138 Miss. 11, 102 So. 771 (1925); Lea v. State, 138 Miss. 761, 103 So. 368 (1925); Walton v. State, 156 Miss. 499, 126 So. 29 (1930); Smith v. State, 161 Miss. 430, 137 So. 96 (1931).

His account of the assault is often incorrect, due to the confusion and excitement that usually surrounds such incidents. Because of his weakened condition he might easily be influenced by questions and opinions of his relatives and friends who are likely to feel antagonistic towards his assailant. Then, too, these relatives and friends are the ones who usually relate his statements to the jury, and their regard for the deceased will often cause them to exaggerate and color the original declaration. The solemnity under which such statements are made is deemed, in theory, as equivalent to the sanctity of an oath, and a satisfactory substitute therefor. However, "the fear of punishment after death is not now considered as so strong a safeguard against falsehood as it was when the rule was first laid down",[12] and such evidence is no longer entitled to an unqualified consideration by the jury.

The courts have repeatedly approved an instruction to the effect that dying declarations are a species of hearsay evidence, intrinsically weaker than if the declarant were present and subject to cross-examination under oath, and are not entitled to the same credit and force as if the deceased were still alive and testifying in the presence of the jury. An explanation of the propriety of such an instruction, apparently accepted by the Mississippi Court, is that it points out, by way of precaution, the inherent qualities which legally pertain to all dying declarations and refers to the "source" rather than the "matter" of the testimony.[13] The courts have enforced this attitude further by refusing to allow the State to instruct the jury that such statements are legal evidence and that the jury is under a duty to consider and weigh them along with the other testimony in determining the guilt or innocence of the accused. This, they say, would be an improper "comment" on the evidence by the court.[14] Furthermore, not only may the declaration be refuted by directly contradictory evidence, but evidence of the nature of that given to rebut the competency of the declaration may go to the jury for the purpose of discrediting the effectiveness of the sanction as a substitute for an oth.[15]

In its application the reasonable-doubt doctrine has the effect of requiring much more convincing proof of competency than is ordinarily necessary in preliminary hearings where the admissibility of evidence is dependent upon

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[12]This language was used in People v. Falletto, 202 N. Y. 494, 96 N. E. 355 (1911), and was approved by the court in the instant case.

[13]Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1898), 76 Miss. 223, 25 So. 158 (1899); Muse v. State, 158 Miss. 449, 130 So. 693 (1930).

[14]Gurley v. State, 101 Miss. 190, 57 So. 565 (1912). It would seem that both instructions mentioned are, in fact, improper comments on the evidence, and the propriety of the distinction is doubtful.

[15]Nelms v. State, 13 S. & M. 500 (Miss. 1850); Lipscomb v. State, 75 Miss. 559, 23 So. 210 (1898), 76 Miss. 223, 25 So. 158 (1899); Gambrell v. State, 92 Miss. 728, 46 So. 138 (1908); Reeves v. State, 106 Miss. 885, 64 So. 836 (1914); Wilkerson v. State, 134 Miss. 853, 98 So. 770 (1924); Muse v. State, 158 Miss. 449, 130 So. 693 (1930); Conway v. State, 177 Miss. 461, 171 So. 16 (1936). The court is very liberal in admitting evidence on behalf of the defendant to overcome the effect of a dying declaration. This is a recognition of the fact that such statements have more weight with a jury than they merit; and, as a result, the defendant now has, in effect, two opportunities to attack the probable credibility of the declarant—once before the judge and again before the jury.

the determination of certain facts collateral to the main issue to be proved. When a dying declaration is offered in evidence, the trial court should excuse the jury and hear all testimony which might reveal the conditions under which the statements were made.[16] If conflicting testimony is given tending to create a reasonable doubt that the declaration is competent the court should not admit it.[17] All doubt should be resolved against the party offering the evidence.[18]

Most critics of the Mississippi rule have apparently regarded it as an indiscriminate transposition of the canons of ultimate proof on the merits to this preliminary issue.[19] A consideration of the cases in which the *defendant* offers such evidence, however, has shown that the court is not applying the same test that is applied to the merits of the case. On the contrary, it has adopted one rule in *all* cases in which dying declarations are offered without distinguishing as to which party offers the evidence. It would seem, therefore, that the court is applying the reasonable-doubt rule because of its skepticism of such statements as evidence.[20]

It seems highly probable that the reasonable-doubt test was first applied to a preliminary hearing without realizing that it was a test intended solely for the merits of the case. Some courts have respected such "precedent" without considering the propriety of the rule. Others, however, have purported to re-examine the premises, and, pecularily enough, these are the courts that seem to have repudiated the doctrine.[21]

An examination of the conditions under which dying declarations are made has shown that they are no longer entitled to the same consideration as testimony given by a living witness. However, in spite of the restrictions placed upon them by the court, they still have a very strong psychological effect on the jury. It is submitted, therefore, that the Mississippi Court is entirely proper in requiring that their competency be proved "beyond a reasonable doubt".

Phineas Stevens

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[16]Owens v. State, 59 Miss. 547 (1882); Bell v. State, 72 Miss. 507, 17 So. 232 (1895): Wilkerson v. State, 134 Miss. 853, 98 So. 770 (1924); Hathorn v. State, 138 Miss. 11, 102 So. 771 (1925).

[17]See note 1, *supra.*

[18]See note 9, *supra.*

[19]3 WIGMORE, EVIDENCE (2d ed. 1923) § 1451, n. 1; 5 *id.* § 2550, n. 6; Maguire & Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence* (1927) 40 HARV. L. REV. 392; Morgan, *Functions of Judge and Jury in the Determination of Preliminary Question of Fact* (1929) 42 HARV. L. REV. 165. State v. Bordeleau, 118 Me. 424, 428, 108 Atl. 464, 466 (1920) refers to the reasonable-doubt rule as an "exotic curiosity".

[20]Of the sixty Mississippi cases in which exceptions were taken to the admission of dying declarations, twenty-eight were reversed on the trial judge's finding of fact as to admissibility; twenty-three were affirmed as to the finding of fact; seven were reversed on other grounds, and in two the declaration was held inadmissible but not prejudicial. Some of the cases were affirmed because of the lack of a specific objection to the admission of the statements.

[21]See *e. g.*, Commonwealth v. Robinson, 146 Mass. 571, 16 N. E. 452 (1888).

LIMITATION OF ACTIONS—TAX TITLES—RUNNING OF STATUTE AGAINST REMAINDERMAN.

Testator devised certain lands to his widow for life with remainder to defendants. The land became delinquent and was sold at a defective tax sale in 1930 to complainant, who went into occupation. The life tenant died in 1936 and defendants seek (by cross bill) to confirm their title in 1938. HELD: The suit by the remainderman to confirm their title as against invalid tax title was not barred by Section 2288, Mississippi Code of 1930, notwithstanding actual occupation by claimant under tax title for three years after the period of redemption, where the bill was filed within three years after death of the life tenant, since the statute was not intended to cut off remaindermen. *Carter v. Moore*, 183 Miss. 112, 183 So. 512 (1938).

Testator devised his land to his widow for life with remainder to complainants. The land was sold at a defective tax sale in 1931 to defendant. Complainants filed suit in 1938 to cancel defendant's invalid tax deed. The life tenant was still living. HELD: Although the life tenant is barred, Section 2288, Code of 1930, does not bar remaindermen where the sale is void. *Cox v. Richerson*, 191 So. 99 (Miss. 1939).

Many states have thought it wise to pass statutes prescribing a short time within which actions may be brought to test the validity of tax deeds, and to bar all remedy if the time is suffered to lapse without suit. The statute in Mississippi[1] has been referred to in *Hamner v. Yazoo Delta Lumber Co.*[2] as a "mere statute of limitations". This interpretation, repeated in the first of the instant cases, makes the title so gained tantamount to title by adverse possession; it is merely secured in a shorter period of time.

The effect of statutes of limitation is to preclude one from asserting his claim when, having the power to assert such claim, he has failed to do so for the period named. Statutes involving the recovery of land have their origin in the legislative attempt to provide a system for automatically quieting all titles. Their moral justification lies not in the merit of the adverse possessor, nor in the demerit of the negligent owner, but in the extent to which they fulfil the purpose of that legislative attempt. The benefit to the public of having a means of quieting titles far outweighs the injury done the rightful

[1]MISS. CODE ANN. (1930) § 2288. "Actual occupation for three years, after two years from the day of sale of land held under a conveyance by a tax collector in pursuance of a sale for taxes shall bar any suit to recover such land or assail such title because of any defect in the sale of the land for taxes, or in any precedent step to the sale, saving to minors and persons of unsound mind the right to bring suit within such time, after the removal of their disabilities, and upon the same terms as is provided for the redemption of land by such persons."

[2]100 Miss. 349, 56 So. 466 (1911). The court also says that, from the wording of the statute "it is manifest that the actual occupation confers ownership, and that the tax deed is the mere color of title to which occupation is referred."

but dormant owner.[3] In furtherance of this purpose such statutes are allowed to run against all persons who have a cause of action, with a saving only in favor of persons under certain disabilities. It could be said, then, that they run, not against persons, but against causes of action, the line being drawn by all courts distinctly between persons who have a cause of action, and those who have none. The two classes of persons consistently falling in the latter category and always allowed a saving are minors and persons of unsound mind. Certain other groups cannot be classified so easily, but must be considered in the light of the existent rules of the particular jurisdiction—the test usually being whether they had a remedy which they could assert during the statutory period.

By an application of these rules a majority of the courts have held that the statutes do not commence to run as against the holder of a remainder or reversion until the expiration of the particular estate, and that one who held land in adverse possession for the statutory period during a life estate, gained no title against the remainderman. The reason ordinarily given for this is that the remainderman has no right of action prior to the death of the life tenant, and thus cannot be deemed guilty of laches in failing to assert any right.[4] It would seem to follow from this that if he had a remedy, the statute would run against him during the continuance of the life estate. Indeed, in states where the remainderman has been given an express statutory right to bring an action to quiet title or settle his interest in the property, prior to the death of the life tenant, his failure to bring such action has caused the statute of limitations to run against him during the life estate.[5] In deciding this question, then, it seems to be established that the court must determine whether, according to the statutes and principles of that particular jurisdiction, the remainderman has a remedy so that the statute of limitation should run against him.

In Mississippi, there are certain remedies which the remainderman has to protect his rights, but the court in the two principal cases has apparently held that those remedies are not sufficient to deny a saving in his favor.

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[3]For a discussion of these principles see Ballentine, *Title by Adverse Possession* (1918) 32 HARV. L. REV. 135. Other writers have given various other constructions to statutes of limitations. Tiffany says "It is, apparently, by reason of the demerit of the true owner, rather than any supposed merit in the person who has acquired wrongful possession of the land, that this possession, if continued for the statutory period, operates to debar the former owner of all rights to recover the land." 2 TIFFANY, REAL PROPERTY (1920) § 500, p. 1920. Dean Ames, in contrasting prescription in the civil law with adverse possession in our law, remarks: "English lawyers regard not the merit of the possessor, but the demerit of the one out of possession." AMES, *The Nature of Ownership*, LECTURES ON LEGAL HISTORY (1913) 192, 197. But, as suggested by Ballentine, such rules look only to the individual case, and lose sight of the ultimate purpose intended by the legislature.

[4]Jeffries v. Butler, 108 Ky. 531, 56 S. W. 979 (1900); Maring v. Meeker, 263 Ill. 136, 105 N. E. 31 (1914); Smith v. Maberry, 148 Ark. 216, 229 S. W. 718 (1921); Ashbaugh v. Wright, 152 Minn. 57, 188 N. W. 157 (1922).

[5]Murray v. Quigley, 119 Iowa 6, 92 N. W. 869 (1902); Criswell v. Criswell, 101 Neb. 349, 163 N. W. 303 (1917).

Chief among these remedies is the right of the remainderman to maintain a bill in equity, prior to the death of the life tenant, to have a cloud upon his reversionary interest removed.[6] He has no right to the possession of the land and thus cannot be awarded possession in such suit, but he can establish his right as remainderman[7] and establish his right to immediate possession upon the death of the life tenant.[8] The decree rendered in such suit would have the effect of establishing once and for all the respective rights of the remainderman and one claiming adversely to him. The rendering of such decree in a suit filed before the statutory period had elapsed would interrupt the running of the statute.[9] Under these holdings the remainderman has every right in Mississippi which was granted to him by statute in Iowa and Nebraska where it was held that the statute runs against him. The remedy is complete as regards the protection of the remainderman's interest in the land, and can be asserted during the running of the statutory period prior to the expiration of the life estate.[10]

In addition to his right to file suit to remove cloud on title, the remainderman may pay the taxes on the land prior to the sale or redeem it as a party at interest within two years after the sale.[11] Such redemption inures directly to the benefit of the life tenant;[12] but since the life tenant is under a duty to pay the taxes,[13] the remainderman can secure a personal judgment against him for all money thus expended.[14] Indirectly it inures to the benefit of the remainderman because it serves to prevent the execution of the tax deed, which if executed pursuant to a sale conducted legally (as it is presumed it was conducted) will destroy all interests in the land and give the purchaser an original title.[15] For this reason the remainderman is under some degree of duty to redeem the land.[16]

Thus, even under an ordinary adverse-possession statute the holding might well have been against the remainderman. But stronger reasons for this result exist in regard to this tax-title statute. The purpose of the adverse-

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[6]Fox v. Coon, 64 Miss. 465, 1 So. 629, (1887); Levee Commissioners v. Nelms, 84 Miss. 642, 37 So. 116 (1904); Clark v. Foster, 110 Miss. 543, 70 So. 583, (1916); 21 C. J. 1012.

[7]Cox v. Richerson, 191 So. 99 (Miss. 1939).

[8]Clark v. Foster, 110 Miss. 543, 70 So. 583 (1916).

[9]Norton v. Graham, 187 So. 510 (Miss. 1939).

[10]But see Note (1918) 2 MINN. L. REV. 137 where the writer criticizes the Nebraska rule, asserting that one should not be barred prior to the accrual of his legal action "because he failed to bring a totally different sort of action in equity." But this loses sight of the purpose of the statute, and proceeds on the theory that its object is the penalty of the owner for failing to assert his rights.

[11]MISS. CODE ANN. (1930) § 3264; Darrington v. Rose, 128 Miss. 16, 90 So. 632 (1922).

[12]Jamison v. Thompson, 65 Miss. 516, 5 So. 107 (1888).

[13]Cannon v. Barry, 59 Miss. 289 (1881).

[14]3 COOLEY, TAXATION, (4th ed. 1924) § 1265.

[15]Paxton v. Valley Land Co., 68 Miss. 739, 10 So. 77 (1891); Hazlip v. Nunnery, 29 So. 821 (Miss. 1901).

[16]See Hazlip v. Nunnery, 29 So. 821 (Miss. 1901), where the court said, "The taxes were a lien on the land itself, and the obligation devolved on all persons in any way interested to see that they were paid."

possession statute[17] is the quieting of titles. The tax-title statute has the added purpose of giving security to those who purchase land at tax sales in order to induce individuals to make such purchases. It was originally passed at a time when most sales were being avoided for defects in the proceedings thereof. This detracted from the public confidence in tax titles, with the result that large tracts of land were reverting to the state for want of a purchaser and were taken off the assessment rolls with a consequent serious depreciation in the state's revenue. The solution was the passage of some measure to give added security to tax purchasers so that there might be purchasers who would pay taxes. The result was this short statute of limitations curing all defects in the tax sale after a prescribed short period of time. Thus, as the court puts it, the "statute is remedial and curative, has its origin in that policy, and, if the words will admit of it, should receive that construction which will accomplish the end aimed at."[18] The Mississippi Constitution, after instructing the legislature to provide by law for the sale of all delinquent tax lands, instructs the courts to apply liberal principles in favor of such titles.[19]

In order to secure purchases at tax sales, the legislature apparently wanted to make tax titles as secure as possible and to cut off grounds for attacking them.[20] This should be a strong factor in getting at the intention of the legislature when construing the statute in its application to a particular set of facts.

In the two instant cases, therefore, a different result might very properly have been reached. But the problem is one of construction of a statute in regard to a situation not expressly covered. Neither result is logically required, and the decision is obviously one of policy—of the attitude of the court toward this type of statute. The holding in these two cases is not incongruous with the general policy of most courts of favoring the owner-taxpayer against the tax purchaser as much as possible—this in spite of certain inconsistent language to be found in some of the cases.

Marvin Williams

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[17]MISS. CODE ANN. (1930) § 2287.

[18]Morgan v. Hazlehurst Lodge, 53 Miss. 665, 682 (1876). See also McGee v. Holmes, 63 Miss. 50, 53 (1885), where the court said, "Its effect is to protect from assailment the tax title of one who, being authorized under the principles of law to claim under a sale for taxes, finds his title, which, if valid, would protect his possession, attacked for irregularities existing in the proceedings of the sale."

[19]MISS. CONST. (1890) § 79.

[20]The wording of the statute provides for a saving in favor of minors and persons of unsound mind, but makes no express mention of remaindermen. The reason for the provisions for the two classes mentioned is obvious, since the members thereof are legally incompetent to institute any action in any court prior to the removal of their disability. But this is not true of a remainderman. Assuming that he is of age and mentally competent, he has the right to prosecute a suit in the courts. Thus it cannot be said that he is under the same logical and primary disability that characterizes minors and persons *non compos mentis*. Instead, if a saving for him is to be provided, it must be done by implication on the grounds of want of a cause of action, making it follow that the legislature must have intended such saving. This is what was done in the Carter case, where the court said that the question had never

NUISANCE—MENTAL DEPRESSION—FUNERAL HOME IN RESIDENTIAL DISTRICT.

Complainants brought a bill to enjoin defendants from operating a funeral home and undertaking establishment on property located in a residential district. HELD: The operation of a funeral home in an exclusively residential district constitutes a private nuisance which may be enjoined by adjacent property owners. *Williams v. Montgomery*, 186 So. 302 (Miss. 1939).

There is no fixed or arbitrary rule governing cases of the kind dealt with in this suit. Each case must be determined by the facts and circumstances developed therein. Even if an injunction may issue where the defendant actively encroaches upon the interests of landowners by way of actual injury to the land or by way of diminution of its desirability on account of invasion of the senses, it is somewhat more doubtful whether an injunction is available through a psychological link.

The courts all agree that a funeral home is not a nuisance *per se*, but that under certain conditions such an establishment may constitute a nuisance.[1] A large number of these courts have allowed injunctions abainst the establishment of funeral homes in residential districts because of a combination of several factors, one of which is the "mental depression" caused the adjacent owners.[2]

There are, however, a few cases allowing injunctions ostensibly on the basis of "mental depression" alone.[3] When confronted with the problem of granting an injunction on this ground alone, some courts have positively re-

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before been decided in Mississippi but cited two cases, Jordan v. Bobbitt, 91 Miss. 1, 45 So. 311 (1907), and Clark v. Foster, 110 Miss. 543, 70 So. 583 (1916), as being "strongly persuasive that the statute was not intended to cut off remaindermen." The possession in both those cases was under a void sale made by court order. The court held that the two year statute of limitations applicable to titles received at such sales did not apply to remaindermen. Since the buyer at a sale by court order takes only the estate of the defendant and doesn't threaten the remainder interest, while a tax purchaser purports to take the entire fee, subject to no future interest, the tax purchaser at least has a greater right to have his title quieted within a short time.

[1]Laughlin, Wood & Co., v. Cooney, 220 Ala. 556, 126 So. 864 (1930); Saier v. Joy, 198 Mich. 295, 164 N. W. 507 (1917); Tureman v. Ketterlin, 304 Mo. 221, 263 S. W. 202 (1924); Streett v. Marshall, 316 Mo. 698, 291 S. W. 494 (1927); Blackburn v. Bishop, 299 S. W. 264 (Tex. Civ. App. 1927); King v. Guerra, 1 S. W. (2d) 373 (Tex. Civ. App. 1927); Most v. Oakley-Metcalf Funeral Home, 101 S. W. (2d) (Tex. Civ. App. 1937); Bragg v. Ives, 149 Va. 482, 140 S. E. 656 (1927); Densmore v. Evergreen Camp, 61 Wash. 230, 112 Pac. 255 (1910).

[2]Osborn v. Shreveport, 143 La. 932, 79 So. 542 (1918) (zoning ordinance); Saier v. Joy, 198 Mich. 295, 164 N. W. 507 (1917) (noxious odors); Blackburn v. Bishop, 299 S. W. 264 (Tex. Civ. App. 1927) (danger of infectious diseases); Densmore v. Evergreen Camp, 61 Wash. 230, 112 Pac. 255 (1910) (odors arising from chemicals used).

[3]Tureman v. Ketterlin, 304 Mo. 221, 263 S. W. 202 (1924); Streett v. Marshall, 316 Mo. 698, 291 S. W. 494 (1927); Cunningham v. Miller, 178 Wis. 22, 189 N. W. 531 (1922).

fused to grant such injunctions.[4] These courts hold to the old doctrine that in order to constitute a nuisance, "the injury must be *physical*, as distinguished from purely *imaginative*. It must be something that produces discomfort or annoyance through the medium of the senses; not from delicacy of taste or a refined fancy."[5] It may be that the courts which adhere to the old doctrine do so from a suspicion as to the reality of the diminution of desirability through a purely psychological, or "mental" link. One case goes so far as to say: "The death-head is kept in the cell of the anchorite, perpetually before his eyes as a needful and salutary monitor."[6] There are courts, however, which have granted injunctions restraining the operation of funeral homes and undertaking establishments in residential districts ostensibly on the sole ground that by their mere presence they constitute an invasion of the plaintiff's right to the comfort and enjoyment of his residence.[7]

It would appear that the courts, in allowing an injunction on the supposedly sole ground of "mental depression", actually consider other factors. They are doing more than protecting the adjacent property owners from the presence of a funeral home. They are actually creating zones in order to assure the property owners in residential districts that their property will not be encroached upon by business of any kind.[8] In deciding a case of this sort the courts are attempting a task for which they are not best fitted. They can consider the case only from the standpoint of the parties litigant, each of whom has a selfish point of view and will present only such information and evidence as directly aids his side of the case, and the interest of the city as a whole may suffer. Again, they must decide each individual case separately and cannot plan any uniform system for a city. The problem is more legislative than judicial, and these difficulties are not present when the work is being done by the administrative or legislative authorities of a city. They can appoint committees to investigate thoroughly and obtain complete and im-

[4]Dean v. Powell Undertaking Co., 55 Cal. App. 545, 203 Pac. 1015 (1921); Pearson & Son v. Bonnie, 209 Ky. 307, 272 S. W. 375 (1925); Ellison v. Commissioners, 5 Jones Eq. 57, 75 Am. Dec. 430 (N. C. 1859) (burial grounds); Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490 (1887); Stoddard v. Snodgrass, 117 Ore. 262, 241 Pac. 73 (1925); Rea v. Tacoma Mausoleum Ass'n., 103 Wash. 429, 174 Pac. 961 (1918) (burial grounds).

[5]Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490, 494 (1887).

[6]Ellison v. Commissioners, 5 Jones Eq. 57, 59, 75 Am. Dec. 430 (N. C. 1859).

[7]*Quaere*: From the cases it is to be concluded that the owner of a vacant lot could restrain the operation of a funeral home next to his lot on the ground that it would impair the future use of the lot. Would the presence of the funeral home constitute an invasion of the plaintiff's comfort and enjoyment at this time?

[8]This is strikingly brought out by the statement in the instant case that the court is not here dealing with a funeral home for an appreciable length of time permanently established unchallenged, nor with one located on a street already being used for conducting commercial enterprises. [186 So. at 305.] This statement is more appropriate to zoning ordinances than to the doctrine of nuisances. Unless a nuisance has continued long enough for there to be a prescriptive right [ten years in Miss.; see Alcorn v. Sadler, 71 Miss. 634, 14 So. 444 (1894)], the fact that it has been in existence for some time is not controlling. West Arlington Imp. Co. v. Mount Hope Retreat, 97 Me. 191, 54 Atl. 982 (1903). *But see* Clifton Iron Co. v. Dye, 87 Ala. 468, 6 So. 192 (1889), in which the court refused to grant relief because the plaintiff was guilty of laches in failing to act with diligence.

partial information. And then they can map out a plan for the whole city and enact it into a zoning ordinance. But if no zoning ordinance has been passed or if the one in existence is incomplete and a suit for injunction is brought before the court it cannot refuse to consider the case. It must make the best of the situation and render the best judgment of which it is capable.

The courts recognize that the very nature of a funeral home militates against its proper operation in the heart of a commercial district. Its nature is such that it requires considerable parking space, quiet, and an atmosphere divorced from the rush and confusion of trade and traffic. On the other hand, the courts recognize that a funeral home is a business activity and that its presence in a residential district may serve as an entering wedge to a transition of that district from a residential to a business district. Those which use the term "residential district" are unanimously of the opinion that the mere presence in the neighborhood of a few business establishments of the kind which serve the inhabitants in their daily life, does not deprive it of its character as a residential district.[9] It has been recognized that the appropriate location for a funeral home is in a district that is neither exclusively residential nor exclusively commercial, and the courts have refused to grant injunctions where the district is semi-commercial.[10]

The circumstances surrounding the location of a proposed funeral home should be carefully considered so that an injunction will not improperly issue and have the effect of impeding the natural growth of the business district of a town. Although in many instances the facts show that the funeral home should be enjoined for other reasons, some courts employ "mental depression" as the ostensible ground for their decisions or as a make-weight therefor. As it appears that a hard and fast rule to the effect that a funeral home is a nuisance *per se* in a "residential district" would be undesirable, the courts should carefully investigate the facts of each case presented and base their conclusion on the facts of the particular case.

In the instant case, it appears that the court did exactly this, in that it based its decision upon the facts gathered from the record and said that it showed the district was strictly residential; was a considerable distance from the business district of the town; and was one of the most beautiful residential districts in the city of Greenwood or in the entire Delta. Certainly the presence of a funeral home in a district of this kind would constitute a blemish upon its character as a residential district, and a real threat to its continued existence.

Louis Alford

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[9]Pearson & Son v. Bonnie, 209 Ky. 307, 272 S. W. 375 (1925) and Tureman v. Ketterlin, 304 Mo. 221, 263 S. W. 202 (1924) hold that drug stores, corner groceries, filling stations, *etc.* are not such businesses as change the nature of the neighborhood. This is probably upon the theory that these businesses serve the inhabitants of that district in their daily life, but a business that brings outsiders in for its trade, is considered a business that will tend to change the district from a residential to a business district.

[10]In Fentress v. Sicard, 181 Ark. 173, 25 S. W. (2d) 18 (1930), the court held that the district was in the period of transition and was the proper place for the location of a funeral home. In the instant case, the court said: "We are not here dealing with a funeral home for an appreciable length of time permanently established unchallenged, nor with one located on a street already being used for conducting commercial enterprises." [186 So. 302, 305.]

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